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No. 139.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D., 1906.

WILMINGTON STAR MINING COMPANY,
Plaintiff in Error,

vs.

MINNIE FULTON,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief and Argument for Plaintiff in Error

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Brief and Argument for Plaintiff in Error.

MAY IT PLEASE THE COURT:

The question arising upon the record in this case, which brings it directly to this court for review, relates to the constitutionality of the Illinois Mining Act of 1899 which renders the owner or operator of a coal mine liable in damages for personal injuries resulting from the wilful act of an employe, viz: the mine manager or mine examiner, notwithstanding other provisions of the same act impose the duty, whose violation has caused the

injury, exclusively and in express terms and under penalties of fine and imprisonment, upon such mine manager or mine examiner, and then require his employment by the mine owner under pain of similar punishment in case of disobedience. The act in question is set out in full as an Appendix to this argument.

The Supreme Court of Illinois in *Henrietta Coal Co.* v. *Martin,* 221 Ill., 460, and other cases cited therein has construed this Act as imposing liability upon the owner of the mine under the circumstances above noted, and while we believe that a simple reading of the Act plainly indicates that it was the intention of the Legislature to commit to the inspectors, mine managers, mine examiners and hoisting engineers, whose duties it prescribes, and for whose competency the board of examiners which it created is to vouch, the interior management and control of the mine and to hold them severally liable, both civilly and criminally, for any wilful violation of such duties, we must accept, as final, the interpretation placed upon the Act by the highest court of the state. As thus construed, however, the Act is in violation of the Fourteenth Amendment of the Constitution of the United States, forbidding a state to make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States, or to deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws.

The facts in this case upon which the action is predicated, are, briefly, as follows:

Samuel Fulton, husband of defendant in error, and a track layer in the employ of plaintiff in error at its mine near Coal City, in Grundy County, Illinois, descended the mine with other employes one Sunday morning when the mine was not in operation, for the purpose of laying switch tracks in the west roadway, so-called, in preparation for the work of the regular miners on the following day. Both the mine manager and the mine examiner accompanied Fulton into the mine. The west roadway generated gas at all times, a fact well known to the mine manager and mine examiner, and all other employes of the mine; and a fan had been installed at the entrance of this roadway as required by law for the purpose of driving air into it and thus insuring the safety of the employes therein. This fan was ample for the purposes designed.

When the men entered the mine this Sunday morning the fan was not in operation and had not been since the preceding day and in consequence the west roadway was filled with gas, facts known to all present in the mine. A brief delay in starting the fan was caused by the absence of a monkey-wrench which was customarily used to open the valve in a steam pipe connected with the fan. As soon as Wilson, the mine manager, had procured another one from the top of the shaft all the men assisted in starting the fan and shortly after it was started and before it had cleared the gas out of the west roadway Fulton and another employe named Schmitz entered this roadway for the purpose of laying switch tracks, carrying open miners' lamps upon their heads. They encountered the gas in the road-

way, an explosion occurred and Fulton was killed, his companion, Schmitz, escaping with serious injuries.

Defendant in error brought suit under Section 33 of the Illinois Mining Act against the owner of the mine, charging eight separate wilful violations of the Act in as many counts. The violations charged, all of which related to duties imposed by the Act upon the mine manager or mine examiner, not upon the owner or operator, are as follows, the page references being to the printed transcript of record:

First Count. (p. 4.) This count is based upon one of the provisions of Section 19 which defines in greater detail than is given in the preceding sections the nature and amount of ventilation which the *mine examiner* shall see "is traveling in its proper course and proper quantity" (Sec. 18 (a)), and the *mine manager* shall measure and otherwise supervise (Sec. 16 (b) and (c)). The trial judge in his instructions placed this duty upon the mine manager. (Rec., 96.)

Second and Third Counts. (pp. 5, 6.) These counts are based on Sec. 16 (b), "It shall be the duty of the *mine manager* to see that cross cuts are made at proper distances apart to secure the best ventilation at the face of all working places and that all stoppings along air ways are properly and promptly built."

Fourth Count. (p. 16.) See Sec. 18 (a) requiring *the mine examiner* to "inspect all places where men are expected to pass or to work and observe whether there are any * * * accumulations of gas" therein.

FIFTH COUNT. (p. 19.) See Sec. 18 (b) prescribing, with other duties of the *mine examiner,* "No one shall be allowed * * * to enter the mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe."

SIXTH COUNT. (p. 22.) See Sec. 16 (b). The *mine manager* "shall keep careful watch over all ventilating apparatus and the air currents in the mine and in case of accident to fan or machinery by which the currents are obstructed or stopped he shall at once order the withdrawal of the men and prohibit their return until thorough ventilation has been re-established."

SEVENTH COUNT. (p. 23.) The Act nowhere requires the owner of the mine to *cause its mine examiner* to visit the mine before the men are permitted to enter it and to see that the air current is traveling in its proper course and in proper quantity. Such a duty is imposed, however, upon the *mine examiner* by Sec. 18 (a) and in so far, if at all, as this count states a statutory cause of action, it is based on this provision.

EIGHTH COUNT. (p. 24.) See Sec. 18 (b). The *mine examiner,* when working places are discovered in which accumulations of gas exist, "shall place a conspicuous mark thereat as notice to all men to keep out."

The question of unconstitutionality was raised upon the trial in various ways—by motion made at the close of all the evidence to instruct the jury to find for the defendant upon the ground, with others,

that the provisions of the Illinois Mining Act upon which the action and each of the counts is based, are contrary to the Fourteenth Amendment of the Constitution of the United States (p. 92); by exception to the court's charge to the jury that any act or omission of the mine manager or mine examiner was the act or omission of the defendant, and that if the jury found from the evidence that such mine manager or mine examiner acting in the usual and ordinary course of his employment and in the scope of his duties, did wilfully and knowingly fail to comply with the provisions of said statute declared upon in any count in the plaintiff's declaration and such wilful failure to comply with the law as aforesaid was the proximate cause of decedent's death, they should find the issue for the plaintiff (pp. 101-2); by requesting instructions as to each of the eight counts of the declaration that no recovery could be had thereunder for the reason that the provisions of the Illinois Mining Act upon which such count was based were contrary to said Constitution (pp. 105-6); by motion in arrest of judgment (p. 108). In each instance proper exception to the court's adverse ruling was preserved, and error assigned thereon.

Other errors complained of and hereinafter presented for the court's consideration in case it should rule adversely to our contention upon the constitutional question, are as follows:

1. The court erred in its instruction to the jury that the question whether Wilson's order to Fulton to enter the west roadway was the proximate cause of his death turned upon the further questions whether there was gas there at the time and whether

such gas was necessary to his death. This question was raised by exception to the court's charge upon this point. (Rec., 101.) (See Assignments of Error, 6 and 7.)

2. The undisputed evidence shows that Fulton entered the west roadway, where he met his death and where he knew at the time that gas existed, either as the result of an order from the mine manager, Wilson, to enter this roadway, or upon his own initiative and under circumstances which amounted to a willful act on his part, whereby the lives and health of persons working in the mine and the security of the mine or its machinery became endangered; an act forbidden by Section 31 of the statute. If he entered by reason of Wilson's order, then such order was the proximate cause of his death. If he entered willfully, then his action was in violation of the statute. In either case plaintiff was barred from a recovery herein upon familiar principles of law. This question was raised by defendant's motion to instruct the jury to find for the defendant, made at the close of all the evidence (Rec., 92), and also by exception to the entry of judgment herein. (Rec., 108.) (See Assignment of Errors, 4 and 40.)

3. The evidence strongly indicated that the circumstances under which the decedent, Fulton, entered the west roadway constituted a willful act, forbidden by Section 31 of the statute, and that such willful act contributed to his death, or at least that his death resulted in part from his reckless disregard of consequences in view of his known surroundings, etc. Defendant was entitled to instructions denying its liability if such facts were established.

Its requests for such instructions were, however, denied by the court. (Rec., 107.) (See Assignments of Error, 36 and 37.)

4. No evidence was introduced in support of defendant's liability as charged in the second and third counts, the undisputed evidence showing that this was a "long-wall mine," so-called, and that crosscuts and stoppings are unknown in such mines. Defendant's motion to strike out these counts and request for instructions to the jury that no recovery could be had thereunder should have been granted. (Rec., 61, 102.) (See Assignments of Error, 12 and 13.)

5. There was uncontradicted evidence that Fulton had entered the mine to work therein on the morning in question under the direction of the mine manager, Wilson. Defendant was entitled to an instruction denying its liability, under Section 18 (b) of the Act, in case such fact was established. The court refused, however, to give to the jury the requested charge upon that point. (Rec., 107.) (See Assignment of Error 38.)

There was, in any event, no basis in the evidence for the liability charged in the fifth count, and defendant's motion to strike out and request for an instruction that no recovery could be had thereunder should have been granted. (Rec., 61, 103.) (See Assignment of Error, 15.)

6. No evidence was introduced of any accident to fan or machinery whereby the air currents in the mine became obstructed and stopped, as charged in plaintiff's sixth count. Defendant's motion to strike

out and request for an instruction that no recovery could be had under said count should have been granted. (Rec., 61, 103.) (See Assignment of Error 16.)

ERRORS RELIED UPON.

4. Said court erred in overruling the motion of defendant's counsel, made at the close of all the evidence offered or received upon the trial of this cause, that the court instruct the jury to find the defendant not guilty, which motion was in writing and in the words following, to wit:

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"Now comes the defendant, by Holt, Wheeler & Sidley, its attorneys, at the close of all the evidence offered in this cause, and moves the court to instruct the jury to find the defendant not guilty.

HOLT, WHEELER & SIDLEY,
Attorneys for the Defendant."

Said motion should have been granted and said instruction given to the jury for the following reasons, with others, each of which is hereby separately assigned as a ground of error herein:

First. That the evidence introduced upon the trial of this cause wholly failed to support any of the counts of the declaration.

Second. The evidence introduced upon the trial of this cause showed conclusively either that Samuel Fulton, the deceased, went into the west entry of the mine where he was killed by direction of the mine manager, Wilson, which direction thereby became the proximate cause of his death, or else that said deceased entered said west entry under circumstances which amounted to a willful act on his part, whereby the lives and health of persons working in the mine and security of the mine or its machinery became endangered, and in either of these cases the plaintiff was barred from a recovery herein.

Third. That none of the counts in the declaration state a cause of action against the defendant.

Fourth. That the provisions of the Illinois Mining Act upon which each and every of the counts in the declaration is based are contrary to the Fourteenth Amendment of the Constitution of the United States, to the effect that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

6. Said court erred in its ruling in the course of its definition to the jury of proximate cause, that if the presence of gas in the mine was necessary to the death of the deceased, Samuel Fulton, then the direction of the mine manager, Wilson, to such deceased to go into the west roadway of the mine would not be the proximate cause of his death, as shown by the

following portion of the charge of the court to the jury, to wit:

"If you believe from the evidence that Wilson, the mine manager, directed Fulton to go into the west roadway, and that said Fulton did so in obedience to such order, and such order was the proximate cause of Fulton's death, without the giving of which Fulton would not have been killed, then the jury is instructed that the plaintiff cannot recover in this case, and the verdict should be for the defendant. You will note there that it follows, if you believe that this instruction, if there was one, to Fulton was the proximate cause of his death, note that in passing upon that question you must determine whether, first, if there was gas there at that time; and whether, if there was, that was or was not the proximate cause of his death. Now, by proximate cause is meant efficient cause. In other words, if the gas had not been there, would his death have followed? And was gas being there necessary to his death? Or was the instruction, if there was one, their willfully sending him there, the thing which caused his death, which was the greater cause? That is a question of fact for you to determine."

7. Said court erred in its ruling that the question of proximate cause of Fulton's death turned upon the presence of gas in the mine and the necessity of such presence for Fulton's death, as shown in the following statement made by the court in connection with that portion of its charge last above set forth: "I said it was for them to determine what was the proximate cause if there was an order for this deceased to go into the mine, or whether it was the gas

being there. Let the instruction be what I stated now, the last time; that covers it."

8. Said court erred in its ruling that the defendant was bound by the act of any of its agents or servants in respect to the matters complained of in this suit, as shown by the following portion of the foregoing charge of the court to the jury:

"The defendant in this case is a corporation, and therefore can only act by and through its officers, agents or employes; and you are instructed that any act or omission of any of its said officers, agents or employes done or omitted in the usual manner and course of their employment, and in the scope of their duties as such officers, agents or employes was the act or omission of the defendant; and if the jury find from all the evidence and under the instructions of the court such officers, agents or employes, or any of them, acting in the usual and ordinary course of their employment, and in the scope of their duties, did willfully and knowingly fail to comply with the provisions of the said statute of Illinois declared upon in any count in the plaintiff's declaration, and such willful failure to comply with the law as aforesaid is the proximate cause of the death of the deceased husband, Samuel Fulton, then you should find the issue for the plaintiff."

9. Said court erred in its ruling that the defendant would be liable in this suit for the act of any agent or representative other than the officers of the defendant, as shown by the following statement of the court made in connection with that portion of its charge last above set forth: "I will amend that by saying any agent, employe or whatever word to

indicate officer, agent or employe; that is, the representative who has power to do the business of the defendant."

10. Said court erred in its ruling that the jury should find the issues for the plaintiff if they found from all the evidence, and under the instructions of the court that the defendant's mine manager or mine examiner, acting in the usual and ordinary course of their employment in the scope of their duties, did willfully and knowingly fail to comply with the provisions of the statute of Illinois declared upon in any count in the plaintiff's declaration, and such willful failure to comply with the law, as aforesaid, was the proximate cause of the death of the deceased husband, Samuel Fulton, as shown by the following statement made by the court in its charge to the jury in connection with and in reference to that portion of its charge to the jury hereinabove set forth under the eighth assignment of error, and its amendment of such portion of such charge hereinabove set forth under the ninth assignment of error:

"That is limited to the superiors; it is limited to the mine manager and the mine examiner."

12. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the second of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given, for the reason that there was no evidence introduced upon

the trial of this cause in support of the defendant's liability as charged in said count.

13. Said court erred in refusing the request of the defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the third of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given, for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

15. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fifth of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given, for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability, as charged in said count.

16. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the sixth of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given, for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

27. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the first of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

28. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the second of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

29. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the third of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

30. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fourth of the eight counts of her

declaration upon which this action proceeds, for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

31. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fifth of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

32. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the sixth of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

33. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the seventh of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

34. Said court erred in refusing the request of

defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the eighth of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

36. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"You are instructed that under the laws of this state in force at the time of Samuel Fulton's death it was unlawful for any miner or other workman in a mine to do any willful act whereby the lives or health of persons working in mines or the security of the mine or machinery thereof was endangered, and such unlawful act was punishable by a fine not exceeding $500, or by imprisonment in the county jail for a period not exceeding six months, or both, at the discretion of the court. You are further instructed that if you believe from the evidence that Samuel Fulton at the time he was killed, was engaged in a wilful act which endangered the lives or health of persons working in the mine with him or the security of the mine or its machinery, and that such wilful act on his part contributed to his death, then the plaintiff cannot recover in this action and your verdict must be for the defendant.

37. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"If you believe from the evidence that the death of Samuel Fulton resulted in part from his reckless disregard of consequences in view of his surroundings and knowledge of the conditions existing in the mine as disclosed by the evidence, then you are instructed that the plaintiff cannot recover herein."

38. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"If you believe from the evidence that the decedent Fulton just before the time of his death entered the mine to work therein under the direction of the mine manager, Wilson, then you are directed to find the defendant 'not guilty,' even though you may further believe from the evidence that all the conditions of the mine had not been made safe at such time, as charged in the declaration."

39. Said court erred in overruling the motion in arrest of judgment requested by counsel for the defendant, it appearing upon the face of the record that no cause of action against the defendant was stated in the declaration filed herein.

40. Said court erred in rendering judgment in this cause against the defendant in the following respects with others, each of which is hereby assigned as a ground of error herein:

First. There is no evidence in the record of this cause sustaining the declaration or any of its counts.

Second. It conclusively appears from the evidence introduced upon the trial of this cause either that the deceased, Samuel Fulton, entered the west entry of the mine, where he was killed, by direction

of the mine manager, Wilson, which direction thereby became the proximate cause of Fulton's death, or, that Fulton entered the said west entry under such circumstances as amounted to a wilful act on his part whereby the lives and health of persons working in the mine and the security of the mine or its machinery became endangered, in either of which cases the plaintiff was barred from recovery herein.

Third. The declaration fails to state any cause of action against the defendant.

Fourth. The provisions of the Illinois Mining Act, upon which each and every of the counts in the declaration is based, are contrary to the fourteenth amendment of the constitution of the United States, to the effect that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

BRIEF OF ARGUMENT.

I.

The Supreme Court of Illinois has interpreted the Mining Act of this state, passed in 1899, as rendering the mine owner or operator liable in damages for death or injury resulting from the violation by any mine official, *i. e.*, the mine manager, hoisting engineer or mine examiner, of any duty imposed by the Act upon such official. See *Henrietta Coal Co.* v. *Martin*, 221 Ill., 460, and cases cited therein. Such interpretation by the highest court of the State is final and conclusive as to the meaning of the Act.

Backus v. *Fort Street Union Depot Co.*, 169 U. S., at 566.

II.

As thus interpreted, the Act is in contravention of the Fourteenth Amendment for the following reasons:

(a) It destroys the relationship between the owner and mine official upon which the doctrine of *respondeat superior* is based, by compelling the official's employment under penalty and then directly imposing duties upon him instead of permitting their delegation by the employer. (See Appendix and summary of statute under I of argument.) To hold the owner of the mine liable under such cir-

cumstances for the officials' defaults is to make one man answerable for the acts of another over whom he has no control and thereby to deny to him inherent and inalienable rights and abridge his privileges and immunities as a citizen of the United States.

Durkin v. *Kingston Coal Co.*, 171 Pa. St., 193.

Williams v. *Thacker Coal & Coke Co.*, 40 L. R. A., 812.

Redstone Coke Co. v. *Roby*, 115 Pa. St., 368.

Colorado Coal & Iron Co. v. *Lamb*, 6 Colo. App., 205.

Fulton v. *Wilmington Star Mining Co.*, 133 Fed. Rep., at 198.

(b) No recognized principle of law permits an employer to be held liable for the acts of a compulsory servant.

14 Am. & Eng. Enc. of Law, (1st Ed.), 809.

20 Am. & Eng. Enc. of Law, (2nd Ed.), 180.

Reno Employers Liability Acts, 33.

James v. *San Francisco*, 6 Cal., 528.

Frazier v. *Railroad Co.*, 180 Mass., 427.

Homer Ramsdell Co. v. *La Compagnie, etc.*, 182 U. S., 406.

Carruthers v. *Sydebotham*, 4 M. & S., 85.

Crisp v. *U. S. etc., Co.*, 124 Fed. Rep., 748.

Harrison v. *Hughes*, 125 Fed. Rep., 860.

(c) The Act, by fixing upon the mine owner a civil liability not imposed upon other employers of labor in Illinois, whereby his property may be taken to pay for a stranger's defaults, deprives him of

liberty and property without due process of law, and denies to him the equal protection of the laws.

Millett v. *The People,* 117 Ill., 301.

Cooley Const. Lim. (1st Ed.), 352-3, 391, 393.

Van Zandt v. *Waddell,* 2 Yerger, 269.

Wally's Heirs v. *Kennedy,* 2 Yerger, 554.

A., T. & St. F. Ry. Co. v. *Matthews,* 174 U. S., 104-5.

G., C. & St. F. Ry. Co. v. *Ellis,* 165 U. S., 154.

The fact that the Illinois Mining Act may be regarded as a police measure does not prevent the application of the constitutional guaranty in question.

Connelly v. *Union Sewer Pipe Co.,* 184 U. S., 558.

The constitutional provision for the security of person and property should be liberally construed.

Boyd v. *U. S.,* 116 U. S., at 635.

G., C. & St. F. Ry. Co. v. *Ellis,* 165 U. S., at 154.

The Act is wholly void by reason of the unconstitutional provision in question, as it cannot be presumed that its framers would have enacted it without this provision which alone deals with the subject of civil liability for its violation.

Connolly v. *Union Sewer Pipe Co.,* 184 U. S., at 565.

III.

Recovery can be had under this Mining Statute only when the defendant's act complained of is the proximate cause of the injury.

Odin Coal Co. v. *Denman,* 185 Ill., 418.

This statute in derogation of the common law must be strictly construed (see authorities hereinafter cited under VI), and no recovery should be permitted except for a violation of some duty clearly imposed by the Act.

The duty of refraining from ordering miners into gaseous portions of the mine is nowhere laid upon the mine manager. On the contrary Section 18 (b) would seem to clearly negative such a duty.

Defendant was entitled to an accurate instruction by the court to the effect that if the act of Wilson, the mine manager, in ordering decedent into the gaseous part of the mine was found to be the proximate cause of the accident, no recovery could be had against the defendant, and it was error for the court to charge the jury in that connection that the question of proximate cause turned upon whether or not there was gas in the mine which was necessary to his death, and without which his death would not have followed. (Rec., 97-8.) The gas was merely the instrumentality producing death, equally necessary to that result whether Wilson's or decedent's act was the proximate cause of the explosion.

The jury were still further confused upon this important question by the further instruction of the

court that they should take into consideration whether the gas being there or Wilson's order was *the greater cause* of his death. (Rec., 98)—a comparison which had no proper place in the solution of the question.

IV.

The evidence discloses but three possible sets of circumstances under which Fulton could have entered the west roadway in which he met his death and to whichever set of circumstances his death is attributed the defendant is free from liability. These possible circumstances are as follows:

1. Either Wilson, the mine manager, ordered Fulton to enter the roadway and he did so in obedience thereto, or

2. Wilson cautioned him not to enter the roadway until the gas had cleared out under the operation of the fan and Wilson had tetsted the roadway with a safety-lamp and Fulton entered in spite of such warning, or

3. No order or caution was given by Wilson, but Fulton entered the roadway upon his own volition, well knowing, as the evidence discloses, without dispute or contradiction, that there was gas in the roadway which his open lamp would in all likelihood explode.

The evidence supporting these three possible theories is shown in the record as follows:

1. The testimony of Schmitz (Rec., 55-6).

2. The testimony of Wilson (Rec., 66, 73), and Capet's corroborating testimony (Rec., 88).

3. As to Fulton having with him an open light at the time of the explosion, see Rec., 33, 45.

As to Fulton's experience and knowledge of the mine conditions see Rec., 35, 40, 49, 62, 64, 65, 76, 77, 83.

If Fulton entered under command from Wilson (No. 1), such command was the proximate cause of his death, and no recovery can be had upon the grounds already considered.

If Fulton's entry in the west roadway was made in spite of a caution (No. 2), or upon his own volition with knowledge of the conditions producing danger (No. 3), then he was engaged at the time of his death in an unlawful act contrary to the express prohibition of Section 31 of the Mining Act, and such unlawful act having contributed to his death, barred the right of recovery herein.

A willful act, as used in the Mining Statute, means that the person performing the act knows what he is doing and intends to do what he is doing, and is a free agent. An act *consciously* performed is *wilfully* performed under this statute as construed by the Illinois Supreme Court.

> *Odin Coal Co.* v. *Denman,* 185 Ill., 413.
> *Carterville Coal Co.* v. *Abbott,* 181 Ill., at 502.

See further for a construction of the term "wilful", as used in such statutes, *Southern Ry. Co.* v. *Carroll,* 138 Fed. Rep., 638.

The foregoing definition of the term "willful" is that given to the jury on the trial of this case at the request of the plaintiff (Rec., 99), and it must

be equally applicable to the acts of the plaintiff's intestate and of the defendant.

Fulton's act, then, being willful and such as to endanger the lives and health of persons working in the mine and the security of the mine and the machinery therein, as evidenced by the result of the explosion on this occasion, was unlawful within the meaning of Section 31 of the Act. It therefore barred the right of recovery herein. "It is the established law that when a plaintiff's own unlawful act concurs in causing the damage he complains of he cannot recover compensation for such damage."

Heland v. *City of Lowell,* 3 Allen, 407.

"The general principle is undoubted, that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort the test in each case is whether when all the facts are disclosed the action appear to be founded in a violation of law, in which the plaintiff has taken part." Citing many authorities.

Hall v. *Corcoran,* 107 Mass., 253.

As long ago as *Holman* v. *Johnson,* Cowper 343, Lord Mansfield said: "The principal of public policy is this, *Ex dolo malo non oritur actio*—no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."

In *Coppell* v. *Hall,* 7 Wallace, 558, this court said:

> "The instruction given to the jury, that if the contract was illegal the legality had been

waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden or denounced. The maxim, *ex dolo malo non oritur actio,* is limited by no such qualification."

And again page 559:

"The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

See further *Gilmore* v. *Fuller,* 198 Ill., 130, and authorities cited therein.

V.

There being evidence in the record from which the jury might have found Fulton's action in entering the west roadway to have been willful and unlawful under the statute, it was the defendant's right to have this question submitted to the jury under the form of instruction requested in that connection. (Rec., 107.) The court's refusal to give this instruction was error, upon the authorities cited under IV, *supra.*

Defendant's further request for an instruction along the same line to the effect that no recovery could be had if Fulton's death resulted in part from his own reckless disregard of consequences in view of his surroundings and the conditions in the mine as disclosed by the evidence (Rec., 107), should also

have been given, as such action on his part, if found by the jury, would have amounted to a willful act under the authorities already cited and would have effectually neutralized the effect of any willful act on defendant's part upon the same principle, that ordinary contributory negligence on plaintiff's part is a defense to ordinary negligence on defendant's part.

VI.

Under proper construction of this mining statute no evidence was introduced in support of the second, third, fifth and sixth counts of the declaration and defendant's motion to exclude these counts from consideration, made at the close of plaintiff's case (Rec., 61), or its requests for instructions as to each of said counts that no recovery could be had thereunder (Rec., 102, 103), should have been granted.

Second and Third Counts.

The evidence showed that this was a "long wall" mine, so called, in which "cross-cuts" and "stoppings" are unknown. (Rec., 33, 41-3.) The statute, therefore, had no application in this respect to the mine in question and the evidence relating to the absence of "cross-cuts" and "stoppings" should have been excluded from the jury.

Fifth Count.

The uncontradicted evidence showed that Fulton was in the mine in question under the direction of

defendant's mine manager. (Rec., 55-6, 64, 65.) The charge to the contrary in the fifth count was, therefore, directly negatived and this count should likewise have been eliminated from the case.

Sixth Count.

This count is based upon Section 16 (b). Evidence of the temporary loss of the monkey-wrench, by means of which the fan was customarily started, did not support the allegation that an accident to the mine machinery had occurred by which the currents of air were obstructed or stopped, as there were no air currents in the mine at the time and no danger to the miners resulted from the occurrence testified to. The provision of the statute in question was made to cover the case of accidents occurring while the mine and its ventilating machinery were in operation by which the lives of the miners would be endangered. The Mining Act must be strictly construed, being in derogation of the common law, and cannot be extended to cover the incident in question.

Cole v. *Mayne,* 122 Fed. Rep., 843.

Hamilton v. *Jones,* 125 Ind., 178.

Shaw v. *Railroad Co.,* 101 U. S., at 565.

Johnson v. *Southern Pacific Co.,* 117 Fed. Rep., 466.

ARGUMENT.

I.

THE MINING ACT, IN SO FAR AS IT UNDERTAKES TO RENDER THE OWNER OF THE MINE LIABLE FOR VIOLATIONS OF DUTY IMPOSED BY THE ACT UPON MINE OFFICIALS WHOM THE OWNER IS COMPELLED TO EMPLOY, IS IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT.

The Illinois Mining Act of 1899 is a radical departure from all preceding legislation in the state upon the subject, in that it effectually takes from the mine owner the subterranean management of his property and commits it into the hands of inspectors, mine managers, mine examiners and hoisting engineers, whom he must employ, yet whose duties and conduct he cannot prescribe or control, for they are laid down by the state authority, which creates and certifies these officials. Prior to 1899 the mining statutes, while they prescribed in increasing detail the duties of the owner or operator, imposed not a single duty upon inspectors, managers, examiners or hoisting engineers, but left them subject to the direction of the mine owner who employed them, and upon whom was specifically placed the responsibility for the operation of the mine.

With the revision of 1899 came a complete change of policy by the state in providing for the health and safety of miners. The location of the mine, its

material equipment and external supervision, are still left to the operator or owner; for example, he shall make accurate maps (Sec. 1-a) and surveys (1-i); have steam boilers inspected (4-i); provide scales (24-a); station top and bottom men (28-a); maintain lights at shaft (28-b); furnish safety lamps (29-a), etc., etc.; but as to all that concerns the immediate health and safety of the miners while at work in the mine the state inspector, mine manager, mine examiner and hoisting engineer are made directly responsible. That there might be no mistake upon this point, Section 6 (a) of the act states that "for the purpose of securing efficiency in the *mine inspection service* and a high standard of qualification in *those who have the management and operation of coal mines,* the State Commissioners of Labor shall appoint a board of examiners to be known as the State Mining Board, whose duty it shall be to make formal inquiry into and pass upon the practical and technical qualifications and personal fitness of men seeking appointment as *state inspectors* of mines, and of those seeking certificates of competency as *mine managers,* as *hoisting engineers,* and as *mine examiners.*" In the minds of the legislators who made this revision the mine managers, hoisting engineers and mine examiners are the persons "who have the management and operation of coal mines," whose standard of qualification must be kept high, just as the inspector is the official who has charge of the "mine inspection service" whose efficiency must be secured. The mine owner or operator is not mentioned or referred to in that connection.

Section 7 specifies the character and qualifications which the State requires of candidates for these several positions. Inspectors must produce satisfactory evidence that they are citizens of Illinois, at least thirty years of age, that they have had a practical mining experience of ten years, and that they are men of good repute and temperate habits. They must submit and satisfactorily pass an examination as to their practical and technical knowledge of mining engineering and mining machinery and appliances, of the proper development and operation of coal mines, of ventilation in mines, of the nature and properties of mine gases, of the geology of the coal measures in said State and of the laws of said State relating to coal mines.

Mine managers must produce evidence that they are citizens of Illinois, at least twenty-four years of age; that they have had at least four years' mining experience and are men of good repute and temperate habits, and must satisfactorily pass such an examination as to their experience in mines and in the management of them, their knowledge of mine machinery and appliances, the use of surveying and other instruments, the properties of mine gases, the principles of ventilation and the specific duties and responsibilities of mine managers as the board shall see fit to impose.

Hoisting engineers must produce evidence that they are citizens of the United States, at least twenty-one years of age; that they have had at least two years' experience as fireman or engineer of a hoisting plant and are of good repute and temperate habits. They must satisfactorily pass an examina-

tion as to their experience in handling hoisting machinery and as to their practical and technical knowledge of the construction, cleaning and care of steam boilers, the care and adjustment of hoisting engines, the management and efficiency of pumps, ropes and winding apparatus and the knowledge of the laws of said State in relation to signals, and the hoisting and lowering of men at mines.

Mine examiners must be citizens of Illinois, at least twenty-one years of age and of good repute and temperate habits. They must satisfactorily pass an examination as to their experience in mines generating dangerous gases, their practical and technical knowledge of the nature and properties of fire damp, the laws of ventilation, the structure and uses of the safety lamps, and the laws of Illinois relating to safeguards against fires from any source in the mines.

The foregoing requirements call for a high degree of intelligence, character and experience in those who would serve as inspectors, managers, hoisting engineers and examiners in coal mines. They must, in fact, be specialists in their several vocations, as intelligent and competent at least, and probably much more so, than the average owner or operator who would regulate and control the operations of a mine in the absence of this legislation. See, in this connection, *Williams* v. *Thacker Coal & Coke Co.*, 40 L. R. A., at 812, hereafter quoted.

Section 8 provides for the issuance of certificates of competency to candidates for the positions of mine managers, hoisting engineers and mine exam-

iners, who have successfully passed the examinations, which certificates qualify them to act in any mine in the state, and make it *unlawful* for the operator of any coal mine to employ or suffer to serve as mine manager, mine examiner or hoisting engineer any person who does not hold such certificate of competency issued by the State Mining Board.

Sections 12, 16, 17, 18 and 19 impose distinct and separate duties upon inspectors, mine managers, hoisting engineers and mine examiners, defining with great particularity the precautions which each shall take in the interest of health and safety in the mines.

State inspectors of mines shall devote their whole time and attention to the duties of their office, make personal examination of every mine within their respective districts, see that every necessary precaution is taken to insure the health and safety of the miners; that the requirements of the Mining Law of Illinois are faithfully observed and obeyed and the penalties for violation of the same promptly enforced. He shall post notices in the mines as directed by Section 12 (f); shall act as sealer of weights (g) and test the accuracy of track and all smaller scales at mines (h); shall make report at the close of the year to the Bureau of Labor Statistics of his acts as such inspector during the year with recommendations as to legislation, and shall collect and tabulate statistics of mines and miners to accompany said report. (i.)

The mine manager shall instruct employes as to their respective duties; shall visit and examine the

working places in the mine as often as practicable; shall provide a sufficient supply of props, caps and timbers, etc., for the miners; shall see that cross cuts are made at proper distances apart to secure the best ventilation at the face of all working places, and that all stoppings along airways are properly and promptly built; shall keep careful watch over all ventilating apparatus and the air currents in the mine, and, in case of accident to fan or machinery by which the currents are obstructed or stopped, shall at once order the withdrawal of the men and prohibit their return until thorough ventilation has been re-established; shall measure the air current and keep a record of such measurements for the inspector; shall examine roadways to escapement shafts, etc., and make a record thereof; shall give special attention to and instructions concerning storage and handling of explosives, etc.; shall see that dusty roads are sprinkled and that all dangerous places are properly marked; shall give attention to the hoisting ropes and test the same; shall have cages, safety catches, etc., frequently examined; shall have the mine examined every morning by the mining examiner before the men are allowed to go to work, and know that top and bottom men are on duty, and that sufficient lights are maintained at the landings. The mine manager or *his agent* shall be at his post at the mine when the men are lowered for work, and shall keep a record of such men, and he or *his agent* shall remain at night until all the men have been hoisted out. (Section 16 f.) Where the duties devolving upon the mine manager are too extensive to be discharged by one man, com-

petent persons may be appointed as assistants to the mine manager, who shall exercise *his functions under his instructions.* How could language more clearly indicate the complete independence of the mine manager from the control of the owner or operator of the mine with respect to the duties assigned to the manager by the statute?

A hoisting engineer shall be in constant attendance at his engine or boilers at all times where there are workmen underground. He shall not permit any one to enter or to loiter in the engine room except those authorized by their positions or duties to do so, *and he shall hold no conversation with any officer of the company or other person while the engine is in motion or while his attention is occupied with the signals.* A notice to this effect shall be posted on the door of the engine house. He shall perform the other duties in connection with his machinery minutely set forth in paragraphs (c), (d) and (e) of Section 17. Here again we note, even more conspicuously, the interference of the state between master and servant, and the statutory abolishment of that familiar common law relationship upon which the doctrine of *respondeat superior* has been reared.

A mine examiner shall be required at all mines. He shall visit the mine before the men are permitted to enter it, and first see that the air current is traveling in its proper course and in proper quantity, and then inspect all places where men are expected to pass or to work, and observe whether there are any recent falls or obstructions in rooms or roadways, or accumulations of gas or other unsafe condi-

tions. He shall especially examine the edges and accessible parts of recent falls and old gobs and air courses, and note his examination upon the wall; shall place a conspicuous mark wherever working places are discovered in which accumulations of gas or other dangerous conditions exist, and report his findings to the mine manager. He shall not allow any one to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work therein except under the direction of the mine manager until all of the conditions shall have been made safe. He shall make a record of the conditions of the mine, which shall be preserved in the office of the company, etc.

By way of more explicit definition of the duties already imposed upon the mine manager and mine examiner Section 19 points out that the air currents referred to shall be sufficient for the "health and safety of all men and animals employed in the mine; that they shall be not less than 100 cubic feet per minute for each person, or less than 600 cubic feet per minute for each animal in the mine, which may be increased at the discretion of the inspector; and that said currents shall be forced into every working place throughout the mine, so that all parts shall be reasonably free from standing powder-smoke and deleterious air of every kind."

The foregoing duties constitute a complete code of procedure for the interior management of the mine, in which, neither by name nor inference, is the owner or operator of the mine included in connection with the duties imposed.

Having thus established a stringent code of duties for owners and operators, inspectors, mine managers, hoisting engineers, mine examiners and miners (see Sections 16a and 31 *re* miners), the act insures its enforcement by providing penalties, both by fine and imprisonment, and denouncing as a misdemeanor "any wilful neglect, refusal or failure to do the things required to be done by *any* section, clause or provision of this act, on the part of the *person or persons* herein required to do them, or any violation of any of the provisions or requirements hereof, etc." (Section 33.)

The concluding paragraph of Section 33 gives the right of action asserted in this case in the following language:

> "For any injury to person or property occasioned by any wilful violations of this act or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby; and in case of loss of life by reason of such wilful violation or wilful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons who were before such loss of life dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives, not to exceed the sum of $5,000."

We submit that a law, such as that above summarized, which singles out one class of individuals in the community, *i. e.*, the owners of coal mines, and imposes upon them liability for another's misdeeds, such as it imposes upon no other persons,—

holding them accountable in damages for the violation, by persons whom they are compelled by law to employ, of statutory duties enjoined upon such person solely,—abridges the privileges and immunities to which they are entitled as citizens of the United States, deprives them of liberty and property without due process of law and denies to them that protection of the law which the state accords to others within its jurisdiction.

The exact question now under consideration came before the Supreme Court of Pennsylvania in *Durkin* v. *Kingston Coal Co.*, 171 Pa. St., 193. The decision is of especial value as coming from the highest court of the greatest coal producing state in the Union, where the relative rights of mine owners and mine workers and the safety of the latter are of paramount importance.

One Durkin recovered judgment against the Kingston Coal Company and its mine foreman on account of the death of his son, due to the neglect of the mine foreman to examine the locality where the accident occurred as required by the act of 1891, entitled, "An act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith." The Pennsylvania act was substantially the same as the Illinois act now under consideration, as appears from the court's synopsis of its material provisions at page 200. It differed from the Illinois act in specifically providing that which the Illinois Supreme Court has read into this act, viz., a right of action against the owner or operator

for any failure of the mine foreman to comply with its provisions. In reversing the judgment as against the company and affirming it as against the foreman, the court say:

> "The first article of the constitution of this state, known as the bill of rights, declares that all men are possessed of certain inherent and inalienable rights. One of these is the right to acquire, possess and protect property. The preservation of this right requires both that every man should be answerable for his own acts and engagements, and that no man should be required to answer for the acts and engagements of strangers over whom he has no control. A statute that should impose such a liability or that should take the property of one person and give it to another, or to the public, without making just compensation therefor, would violate the bill of rights, and would be for that reason unconstitutional and void. (*Harvey* v. *Thomas,* 10 Watts, 66; Ervine's Appeal, 16 Pa., 265; Kneass' Appeal, 31 Pa., 87; *Wolford* v. *Morgenthal,* 91 Pa., 30; *Godcharles & Co.* v. *Wigeman,* 113 Pa., 431.) It is in furtherance of the right to acquire, possess and protect property that Sec. 18 of the bill of rights prohibits the enactment of laws that shall interfere with or impair the obligation of contracts. The tendency toward class legislation for the protection of particular sorts of labor has been so strong, however, that several statutes have recently been passed that could not be sustained under the provisions of the bill of rights. Such was the case in *Godcharles* v. *Wigeman, supra.* Such was the case with some recent provisions relating to mechanics' liens, and such is alleged by the appellant to be the case with some of the provisions of the Act of 1891, P. L. 176, under which this action was brought."

The court then reviews the provisions of the act and continues:

"After having thus most effectually taken the management of his mining operations out of his hands and committed it to officers of its own creation, whose employment is made compulsory upon him, the statute, in Sec. 8 of Art. 17, imposes upon the mine owner a liability for the neglect or incompetency of the men whom he is compelled to employ, in these words: 'That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any * * * mine foreman, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby; and in case of loss of life by reason of such neglect or failure aforesaid, a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost for like recovery of damages for the injury they shall have sustained.' This statute, regarded as a whole, is an extraordinary piece of legislation. Through it the lawmakers say to the mine owner, 'You cannot be trusted to manage your own business. Left to yourself, you will not properly care for your own employes. We will determine what you shall do. In order to make it certain that our directions are obeyed we will set a mine foreman over your mines with authority to direct the manner in which your operations shall be conducted, and what precautions shall be taken for the safety of your employes. You shall take for this position a man whom we certify to as competent. You shall pay him his salary. What he orders done in your mines, you shall pay for. If, notwithstanding our certificate, he turns out to be incompetent or untrustworthy, you shall be responsible for his ignorance or negligence.' *Under the operation of this statute the mine foreman represents the commonwealth.* The state insists on his employment by the mine owner, and in the name of the police power turns over

> to him the determination of all questions relating to the comfort and security of the miners, and invests him with the power to compel compliance with his directions. Incredible as it may seem, obedience on the part of the mine owner does not protect him, but if the mine foreman fails to do properly what the statute directs him to do, the mine owner is declared to be responsible for all the consequences of the incompetency of the representative of the state. This is a strong case of binding the consequences of the fault or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is civil responsibility without blame and for the fault of another."

The court then further considers the case from the standpoint of the fellow-servant doctrine, declares the certified mine foreman is responsible for the consequences of his own negligence, and concludes as follows:

> "The ground on which we place our judgment is not, therefore, that the act is local, but that the provisions of it which we have considered are in violation of the bill of rights."

In *Williams* v. *Thacker Coal & Coke Co.*, 40 L. R. A., 812, which arose under a mining statute based upon that of Pennsylvania, the Supreme Court of Appeals of West Virginia say:

> "The statute requires that the operator or agent of every coal mine shall employ a competent and practical inside overseer. For what purpose? To better secure the proper ventilation of the coal mine, and promote the health and safety of persons employed therein. Operators and agents are not supposed to have the practical knowledge necessary to look after these matters which are of so much importance to the interests of the miners and employes in

and about the mines; therefore the Legislature with proper solicitude for the welfare of those who brave the dangers of the mines in order to make a living for those dependent upon them asserts its prerogative, and so far interferes with the private business of the capitalist who engages in the mining business as to require him to take into his employment a person whose experience in the business and sound judgment equip him for such management and oversight of the conduct of the mine as to reduce the dangers thereof to a minimum."

The court then refers with approval to the holding of the Pennsylvania court in the Durkin case, (*supra,*) that the Pennsylvania Act, in so far as it imposed liability on the mine owner for the failure of the mine foreman to comply with the provisions of the act which compelled his employment and defined his duties, was unconstitutional and void, and concludes:

"The duty of the operator or agent is to employ a competent mine boss according to the provisions of the statute, and when he has done so, he has discharged his duties to his employes in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from the negligence of the mine boss, *who is not a vice principal as his duties are not delegated to him by his employer, but are prescribed by statute.*"

In *Redstone Coke Co.* v. *Roby,* 115 Pa. St., at 368, the court say:

"It has been held in a number of recent cases that the mine owners are not responsible for the negligence of their mining boss. Reasonable care must be exercised in selecting a competent person for such position. But when

such care has been exercised the cases are clear that the company employing him is not liable for his negligence. This results necessarily from the Act of April 28, 1877, P. L., 58, which imposes upon the company the duty of providing a miners' boss. This act was passed, as its title shows, to protect the health and safety of the persons employed in the bituminous coal mines, and is a wise and just measure. The one great danger of such mining operations has always been the accumulation of foul air and gases, and it was to avoid this and secure proper ventilation that the fifth section of the act requires the mine owner, *nolens volens*, 'to employ a competent and practical inside overseer, to be called a mine boss,' etc. The section then proceeds to define his duties, the principal of which is to see that the mine is kept properly ventilated. The mining boss is therefore *a creature of the Legislature, selected by the mine owner, in obedience to the command of the law, and in the interest and for the protection of the miners themselves.* It has therefore been properly held that where the mine owners have exercised reasonable care for the selection of a competent mining boss, they are not liable for injuries resulting from his negligence."

In *Colorado Coal & Iron Co.* v. *Lamb*, 6 Colo. Appeals, at 205, it is said:

"We are unable to see how it is possible to compel a company to employ a mine boss, upon whom is laid the responsibility and the duty by statute to attend to the mine and its safety as a place to work in, clothe him with full authority and power in this respect, and subject him to punishments and responsibilities in case of failure, and then hold the master responsible for his acts. He is in no sense the representative of the master, from whom the statute attempts to take entire control of this part of his min-

ing operations. The master may supervise him and he may, so far as may be, direct such changes to be made as his judgment indicates to be necessary, but when the statute put the control of this particular matter into the hands of the boss and left to his judgment both the question of safety and the means to be used to that end, we are unable to see how he is in any sense, either as vice principal or otherwise, the representative of the master, or how he can stand in any other relation to his co-laborers than that of a fellow-servant."

The same result as to the unconstitutionality of this Illinois Act is reached by a consideration of the authorities holding that an employer is not liable at common law for the defaults of servants whose employment by him is compulsory. This doctrine is somewhat developed in the cases already cited and is squarely dealt with by other authorities, which we shall now consider.

"Where a person or a corporation is compelled by law to employ an individual in a given manner, no liability attaches for his tortious or negligent acts."

14 Am. & Eng. Enc. of Law (1st Ed.), 809.

"To constitute the relation of master and servant, and to fix the liability of the former for the negligence of the latter, resulting in injuries to third persons, there must exist a right to select the person claimed to be a servant, and also the power and duty to control his acts in regard to the transaction out of which the injury arose."

20 Am. & Eng. Enc. of Law (2nd Ed.), p. 180.

"When the law compels a corporation to give out a contract for grading a street to the lowest

bidder, it takes away from the corporation the responsibility arising from the acts of the person taking the contract."

James v. *San Francisco,* 6 Cal., 528.

"But it seems that a statute which undertakes to render an employer liable for the negligence of a compulsory employe, is unconstitutional and void."

Reno Employers' Liability Acts, 33.

In *Frazier* v. *Railroad Co.* 180 Mass., 427, the court held that the defendant was not liable for injury to a passenger occurring in a station which the railroad company was compelled by law to use.

This subject has been repeatedly before this court in the Pilotage cases, so-called, and while for many years there was considerable uncertainty in the Federal Courts upon this question owing to the confusion of the rules of maritime and the common law, it was finally set at rest in *Homer Ransdell Co.* v. *LaCompagnie, etc.,* 182 U. S., 406.

The New York Pilotage statute of 1857 provided that every master of a foreign vessel bound to or from the port of New York by the way of Sandy Hook "shall take a licensed pilot, or, in case of refusal to take such pilot, shall himself, owners or consignee, pay the said pilotage as if one had been employed, and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel." It further provided that any person not holding a license as pilot under this act who should pilot any vessel to or from the port of New York by the way of Sandy Hook should be punished

by fine or imprisonment, and that all persons employing a person to act as pilot and not holding a license under said act or under the laws of New Jersey should pay a fine.

This Court held that this statute clearly imposed compulsory pilotage; that the action in the case was at common law. and that at common law no action can be maintained against the owner of a vessel for the fault of a compulsory pilot, and this upon the ground that the pilot could not be considered under the circumstances as the representative or agent of the owner. The court quotes with approval the opinion of Lord ELLENBOROUGH, in *Carruthers* v. *Sydebotham,* 4 M. & S., 85, as follows:

> "Now, to make the pilot the representative of the master, and consequently to exempt the underwriters from liability for his acts, it must first be shown that there is a privity between the pilot and the master, so that the one may be considered as the representative or agent of the other; but does the master appoint the pilot? Certainly not; the regulations of the general pilot act impose a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed within any limits for which pilots are lawfully appointed. * * * But if the master cannot navigate without a pilot except under a penalty, is he not, under the compulsion of law, to take a pilot, and if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is that there is no privity between them."

To the same effect see *Crisp* v. *U. S., etc., Co.*, 124 Fed. R., 748, and *Harrison* v. *Hughes*, 125 Fed. R., 860.

The objection that the Illinois Act in question does not in express terms, such as those employed in the statute of other states heretofore considered, obligate the owner to employ these mine officials and that, therefore, there is a distinction between the cases cited and the one at bar, is completely met by the reasoning of Judge Jenkins in his dissenting opinion filed in *Fulton* v. *Wilmington Star Mining Company*, 133 Fed. Rep., 198, on appeal from a judgment in favor of the defendant, rendered upon an earlier trial of this case, when he says:

> "The cases of *Carruthers* v. *Sydebotham*, 4 M. & S., 77, 85, *Homer Ramsdell Transportation Company* v. *LaCompagnie Generale Trans-Atlantique*, 182 U. S., 406, *Crisp* v. *United States & Australasia S. S. Company*, 124 Fed., 748, *Durkin* v. *Kingston Coal Company*, 171 Pa. State, 193, and *Williams, Admx.*, v. *Thacker Coal and Coke Company, West Virginia*, 40 L. R. A., 812, are distinguishable from the case in hand in this one respect, that by the terms of the statute laws there considered it was obligatory upon the master to employ the servant for whose act he was sought to be held liable, while here, the obligation to employ a mine manager or boss is not rendered obligatory by the express terms of the statute. Is not, however, the distinction more imaginary than real? By the act in question the Legislature was dealing practically with a practical subject, the operation of mines, known of all men necessarily to require the aid of men and in divers service. Is it just to assert that the owner may himself serve as mine manager? The same argument would hold with respect to hoisting engineer

and others engaged in service about the mine. The owner could not act in either capacity unless licensed by the state, subject to revocation at the discretion of the State Mining Board. The mine owner, whether individual or corporation, desiring to use the property, could not possibly do it without employment of servants in the different departments specified in this act. Practically, therefore, the act is an inhibition upon the owner to operate the property unless he employ men of the class selected for him and licensed by the state. If the master is to be held for the act of his servant, he should have free choice in the selection of that servant. Liability for omission of duty by the servant cannot rightfully be an incident of employment under compulsion. The principle of law that justly holds one liable for the act of his agent within the scope of his employment, implies voluntary action upon the part of the master in engaging his agent, and unrestrained choice in his selection. Such unrestrained choice seems wanting here."

The foregoing reasoning is likewise a complete refutation of the position taken by the court in *Henrietta Coal Company* v. *Martin*, 221 Ill., at 466, in refusing to follow the lead of the Pennsylvania Supreme Court in declaring the mining law of that state unconstitutional in the Durkin case. They say:

"We think the effect of the statute is to require of the owner of the mine the performance of those duties which the statute prescribes for the mine examiner and the mine manager. The proprietor, if an individual, may himself act in either capacity if he possesses the necessary certificate, otherwise he is required to perform such duties through the manager or through the examiner. They stand for him and are vice-principals, and perform those duties, which he may not delegate to others in such manner as to

> relieve himself of responsibility. For any willful violation of the statute by either of them or for any willful failure of either of them to observe its provision, he is liable."

We submit that the argument thus advanced by the court is entirely fallacious, both because the statute, in terms not open to construction, imposes the duties upon the mine examiner and the other mine officials exclusively, and not upon the owner, who, therefore, has no duties of this character which can be delegated by him, and for the further reason that it is obviously impossible for the proprietor to act in the various capacities and perform the various duties required by the act. The latter point is the one relating to compulsory employment in which we are now especially interested. As Judge Jenkins says, "Is it just to assert that the owner may himself serve as mine manager? The same argument would hold with respect to hoisting engineers and others engaged about the mine." Reference to the synopsis of the qualifications and duties required by the Illinois Act of mine inspectors, examiners, managers and hoisting engineers presented at an earlier stage of this argument, shows the impossibility of any owners performing these multiplied and diversified duties, even if he could qualify for all of the positions. How could an individual proprietor, for example, acting as his own hoisting engineer, mine manager and mine examiner, comply with section 17 (a), requiring the hoisting engineer at any mine to be in constant attendance at his engines or boilers at the top of the mine at all times when there are workmen underground, and also with sections

16 and 18 requiring his attendance underground in the performance of the numerous duties therein specified while the workmen are in the mine? As a practical vocation coal mining would cease in the State of Illinois if all of the duties imposed by the act upon the officials mentioned had to be performed by a single proprietor. That mining officials, such as managers, examiners and hoisting engineers, are indispensable to the operation of a coal mine has been recognized in Illinois by years of legislation upon the subject, wherein these officials are referred to by their titles, and their presence in coal mines assumed. So far as mine examiners are concerned, the statute expressly provides *"a mine examiner shall be required at all mines"* (Section 18a.) When, therefore, the statute in addition provides in express terms that it shall be *unlawful* for the operator of any coal mine to employ or suffer to serve as a mine manager, a hoisting engineer or a mine examiner, one who does not hold a certificate of competency issued by the state's duly authorized Board of Examiners (Section 8 (e), (f) and (g)), it, in effect, and as fully for all legal and practical purposes as the Pilotage Law and other acts referred to, requires him either to employ such certificated officials or to cease doing business within the state.

If, then, the common law exempts all other employers of labor in Illinois from liability for the defaults of compulsory servants, while this act fastens such liability upon the owners of coal mines, how can it be maintained that the latter are accorded the equal protection of the laws? And when, by reason of such act, the owner's property is taken

under judgment of a court to pay for an injury which such compulsory servant has inflicted in violation of a duty specifically imposed upon him, the servant, why is not the owner deprived of property and liberty without due process of law?

"The words, 'due process of law'," says the Illinois Supreme Court in *Millett* v. *The People,* 117 Ill., 301, "are held to be synonymous with the words 'the law of the land'," citing Cooley on Constitutional Limitations (1st Ed.), pages 352-3. "And this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals," citing with other cases, *Van Zandt* v. *Waddell* 2 Yerger, 269.

The Illinois Court in the same case quotes with approval the following statement from the opinion in *Wally's Heirs* v. *Kennedy,* 2 Yerger, 554:

> "The rights of every individual must stand or fall by the same rule of *law* that governs every other member of the body politic or land under similar circumstances and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community, and those made the law, by another, whereas a like general law affecting the whole community equally could not have been passed."
>
> "Everyone," says Cooley's Constitutional Limitations, (1st Ed.), p. 391, "has a right to demand that he be governed by general rules,

and a special statute that singles his case out is one to be regulated by a different law from that which is applied to all similar cases *would not be legitimate legislation but an arbitrary mandate, unrecognized in free government.*"

And again, at p. 393:

"The man or class forbidden the acquisition or enjoyment of property in the same manner permitted to the community at large would be deprived of *liberty* in particulars of primary importance to his or their pursuit of happiness."

"On the other hand, it is also true that equal protection guaranteed by the Constitution forbids the Legislature to select a person, natural or artificial, and impose upon him, or it, burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual or one corporation and enact that whenever he or it is sued, the judgment shall be for double damages or subject to an attorney's fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

A., T. & St. Fe Ry. Co. v. *Matthews,* 174 U. S., 104-5.

The fact that the Illinois Mining Act may be regarded as a police measure does not prevent the application of the constitutional guaranty in question.

"The question of constitutional law to which we have referred," says the court in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 558, "cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the state when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to person within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Furthermore, the constitutional provision for the security of person and property should be liberally construed. See the opinion of Mr. Justice Bradley in *Boyd* v. *U. S.*, 116 U. S., 616, 635, quoted with approval in *Gulf Colorado & St. Fe Ry. Co.* v. *Ellis*, 165 U. S., at p. 154.

What is the essential difference between the business of coal mining as carried on in this state and

that of railroads, rolling mills, saw mills, and other equally hazardous pursuits which justifies the imposition of a civil liability in the one case which is unknown in the others? It may be that the police power will justify the regulation of the interior management of a coal mine by the state in the manner set forth in this act, by reason of the great dangers incident to such employment, but it is not regulation of the physical operation of the mine, in which, alone, the state is interested, to decree that in case the rules laid down for such operation are violated by the persons specially chosen to perform them, a third party, the owner, who is assigned no part in such operation, and can not regulate them if he would, shall be responsible in damages therefor.

This legislation cannot be justified upon the ground that the discrimination against owners of coal mines involved in the provision that they shall be liable for the willful defaults of these compulsory servants promotes the object for which the statute was passed as announced in its title, viz., providing for the health and safety of persons employed in coal mines. If the relations of owner and mine manager or examiner were left as at common law, then under the familiar rules governing master and servant, the operator would have a direct control over the acts of the manager and examiner and enjoy the privilege and be under the obligation of prescribing their duties and superintending the same, and would have such direct and immediate interest therein that a fine or penalty or right of action against him for injury caused by these servants would spur him to greater diligence and care in their

selection and supervision and in the framing of their rules of conduct, and to that extent it could be claimed that the imposition of such penalty or right of action would be promotive of the health and safety of the miners in his employ. But under this mining act, which invades and overturns the familiar common law relations of master and servant, the owner is powerless to protect his miners as to those matters which are committed by the state to the mine manager, hoisting engineer and mine examiner, and no amount of penalties or liability for injuries directed against him can improve his position or the miners' in that respect. He would be guilty of an illegal act if he attempted, for example, in the interest of his employes, to regulate the air currents in his own mine, or direct the manner in which explosives should be handled therein, without first passing an examination and procuring a state certificate as a mine manager or examiner, and the statute imposes no such obligation upon him.

Furthermore, the reasonable view to take of this legislation is that its object will be best promoted by imposing a civil liability upon those officials who are made directly responsible for the safety of the workers in the mine, for it accords with reason to hold that a mine manager would be more diligent in complying with the requirements of the act and thus more surely preserve the lives and health of the miners, if he knew that in case of his default he would be held liable in damages therefor, than he would while knowing that his employer would be the one to suffer in such a case. Every argument which justifies his criminal liability for violation of

the Act—and it will not be contended that the penalties prescribed by Section 33 could be inflicted upon the owner as punishment for the mine manager's default—calls for his civil liability for the same offense.

Finally it is to be said, that, all question of discrimination aside, such an act as this mining statute could not be upheld as against the Fourteenth Amendment, even if all employers of labor in the state were placed on the same basis of liability as there laid down, for the reason that it would deprive such employers of a privilege and immunity to which they are entitled as citizens of the United States. As said by Judge Cooley in the work above cited, such an act "would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government."

To again quote from the opinion in the Durkin case, *supra*, "This is a strong case of binding the consequences of the fault or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is civil responsibility without blame and for the fault of another." As stated at an earlier place in this same opinion, any law which arbitrarily rendered a person answerable for the acts and engagements of strangers, over whom he had no control, would violate one of the inherent and inalienable rights which all persons possess. The holding of the master for the act of his servant is justified in law solely upon the doctrine of *respondeat superior*, predicated upon the theory of delegated duties, and this theory has already, especially in cases of wilful acts on the part

of the servant, been strained to its utmost limitations in an effort to secure a responsible defendant. It is incapable of further extension under the Illinois Mining Act to include the mine owner, in the face of express negation of his position as *superior*, without resort to a new and revolutionary doctrine as yet unrecognized in American jurisprudence. If the Illinois legislature has the right contended for in the present action, of declaring those persons master and servant who are, upon every established principle of law, strangers, then it has the right to arbitrarily declare other strangers to be principal and agent, or husband and wife, or parent and child, irrespective of the facts in the case, and hold them liable before the law for the performance of the duties attendant upon those relationships.

As construed by the Illinois Supreme Court, we must read into Section 33 of the Act the following provision: "For any injury to person or property occasioned by any wilful violations of this Act, or wilful failure to comply with any of its provisions, a right of action *against the owner or operator of the mine* shall accrue to the party injured for any direct injuries sustained thereby." This is the only civil liability imposed and it extends to every provision of the Act which imposes a duty upon or prohibits an act by the mine officials or the miners, and these provisions make up the bulk of the Act. As it can not reasonably be presumed, in view of this section, that the legislature would have enacted this statute without any provision for civil liability, and as the only provision upon that subject in the Act has been shown to be unconstitutional, it follows

that the entire Act is invalid (see *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., at p. 565), and should be blotted out to make way for a sane and reasonable law upon this subject.

II.

THE COURT'S ERRONEOUS INSTRUCTION AS TO "PROXIMATE CAUSE."

The Court instructed the jury that if they believed from the evidence that Wilson, the mine manager, directed Fulton to go into the west roadway and that Fulton did so in obedience to such order, and such order was the proximate cause of Fulton's death, without the giving of which Fulton would not have been killed, then the plaintiff could not recover. (Rec., 97.) This instruction was proper both because such act of the mine manager would not be a violation of the statute, there being no prohibition of such act therein, and for the further reason that if such order from the mine manager was the proximate cause of Fulton's death, then none of the acts charged in the eight counts of the declaration would be such proximate cause, as it was requisite that some one or more of them should be to justify a recovery herein. (*Denman* case, 185 Ill., 418.) The court, however, then proceeded to define to the jury the meaning of "proximate cause" as used in the foregoing instruction, and in so doing used the following language (Rec., 97-8):

> "You will note there that it follows, if you believe that this instruction, if there was one, to Fulton, was the proximate cause of his death,

note that in passing upon that question you must determine whether, first, if there was gas there at that time and whether, if there was, that was or was not the proximate cause of his death.

Now, by 'proximate cause' is meant efficient cause. In other words, if the gas had not been there would his death have followed?

And was gas being there necessary to his death? Or was the instruction, if there was one, their wilfully sending him there the thing which caused his death; which was the greater cause? That is a question of fact for you gentlemen to determine."

We submit that the necessary result of this instruction was to hopelessly confuse the jury as to the true issue then under consideration. It may be conceded that if the gas had not been there Fulton's death would not have followed, and that the presence of gas there was necessary to his death, and still the question whether Wilson's order was the proximate cause of death remains unanswered. The gas was merely the instrumentality through which Fulton's death was brought about, just as the water beneath the vessel is the instrumentality that produces the death of one who drops overboard. Each element is necessary to the death in the given case, yet neither is the proximate cause of the death, in the legal sense of that term, nor does the fact that it is so necessary throw any light on the question of proximate cause. If the man went overboard as the result of a deliberate attempt at suicide, then his own act was the proximate cause of his death. If he was ordered by the captain to jump overboard and did so because of such order, and against his

own wishes, then the captain's act was the proximate cause of death. In either case the water plays the same part in the tragedy. So with the gas in the mine. If Fulton entered the gaseous roadway because of Wilson's command, and would not otherwise have done so, then such act on Wilson's part was the proximate cause of his death. If he entered for some other reason than the command from Wilson, then such act of Wilson's was not the proximate cause of death. In either event the gas was essential to the fatal result, but not in law its efficient cause. Yet the court, in effect, told the jury that if the presence of gas in the roadway was necessary to Fulton's death, then such gas and not Wilson's order, was the proximate cause of death and the defendant would be liable therefor; and this statement was repeated by the court after defendant's counsel had taken an exception to the original instruction. (Rec., 101.) Furthermore, the court said to the jury, "Was gas being there necessary to his death? Or was the instruction, if there was one, their wilfully sending him there, the thing which caused his death; *which was the greater cause?*"—a comparison which had no proper place in a consideration of proximate cause and which still further tended to mislead the jury as to the true issue before them.

The testimony of the witness Schmitz (Rec., 56) that Wilson had ordered Fulton to enter the west roadway just before his death was the turning point of the case before the jury. Plaintiff had introduced this testimony to show a wilful, deliberate act on the part of the defendant conducing to Fulton's death. Defendant sought to show that such act, if it oc-

curred, furnished an independent and proximate cause of death not counted on in the declaration nor covered by the statute. The defendant was entitled to an accurate instruction upon this vital point, instead of the misleading definition which made defendant's liability turn upon the question whether the presence of gas in the mine was necessary to Fulton's death. We submit that this instruction constituted reversible error.

III.

FULTON'S DEATH WAS DUE TO HIS ENTRY INTO THE WEST ROADWAY OF THE MINE EITHER BY REASON OF WILSON'S ORDER SO TO DO OR ELSE UNDER CIRCUMSTANCES THAT AMOUNTED TO AN UNLAWFUL ACT ON HIS PART, CONTRARY TO THE PROVISIONS OF SECTION 31 OF THE MINING ACT. IN EITHER CASE PLAINTIFF WAS BARRED FROM A RECOVERY HEREIN.

In referring in this connection to the evidence introduced upon the trial we do so not with a view to asking this court to weigh the evidence upon any disputed fact, but for the purpose of showing that upon a set of facts established upon the trial which can not and will not be disputed the plaintiff is absolutely barred from recovery herein. The questions considered are solely questions of law, depending for their solution upon the meaning of certain provisions of the Mining Act.

There are three, and only three, possible explanations of Fulton's entry into the gaseous west roadway of the mine on the morning of his death, which

the evidence discloses. Either (1) Wilson, the mine manager, ordered him to enter and he did so in obedience thereto, or (2) Wilson cautioned him not to enter until the gas had cleared out and he entered in spite of such warning, or (3) no order or caution was given by Wilson, but Fulton entered of his own volition, well knowing that there was gas in the roadway which his open lamp would, in all likelihood, explode. Upon theory number 1, Wilson's act was the proximate cause of Fulton's death and the defendant was not liable as the court undertook, though in misleading terms, to tell the jury. (Rec., 97-8.) Under theory number 2 Fulton was guilty of the unlawful act of entering the roadway against caution (see Sec. 31 of Statute), thereby directly contributing to his own death and the court properly instructed the jury to that effect. (Rec., 98.) Under theory number 3 Fulton, if he knew that there was gas in the roadway which was liable to explode upon contact with his open light, was in the performance of a "wilful act whereby the lives or health of persons working in mines or the security of the mine or machinery thereof" was endangered, which is expressly made unlawful by the concluding provision of said Section 31, as the Court should have instructed the jury, upon request of defendant, but which the court refused to do (Rec., 107), an error on its part which we shall hereafter consider.

The evidence bearing upon these t' ree possible theories of Fulton's action is as follows:

(1) The witness Schmitz, who was with Fulton at the time of the accident, testified (Rec., 55-6) that while he and Fulton and Wilson were at the bottom

of the shaft Wilson told Fulton to go into the west roadway. This is all the evidence in support of such order. Schmitz further testified that Wilson gave no order to wait until the gas was out of the roadway.

(2) Wilson testified (Rec., 66, 73) that he gave no instructions to Fulton to go into the west roadway, but on the contrary, cautioned him against going into it until the fan had cleared out the gas and he, Wilson, had gone in and tested it with a safety lamp. This, and Capet's corroboratory testimony at page 88 of the Record, was all the evidence in support of such warning.

(3) It is of course possible that neither Schmitz nor Wilson told the truth and that neither order nor warning was given by the latter, in which event, and in the absence of all other explanation, it must be assumed that Fulton entered the roadway upon his own volition. He and Schmitz had with them the naked lights that caused the explosion (Rec., 33, 45). It only remains to show that Fulton knew that there was gas in the roadway and that an explosion was likely to follow, in order to establish his action as grossly reckless and unlawful under the statute.

Fulton was 36 years old at the time of his death and for more than seventeen years had been a track layer in the mines of the defendant (Rec., 49, 62). He had been working in the mine where he met his death for some time before the accident—Wilson says two or three months (Rec., 62)—and had laid all the track that had been laid in the mine, including that in the west roadway (Rec., 40, 62), and

had brushed gas out of it. (Rec., 83). There was always gas in the west roadway from the time it was opened until the time of the accident (Rec., 40, 64) and the fan which had been installed in this roadway some two months prior (*Ibid.*), was, as every workman in the mine of course knew, put in to overcome this difficulty. Fulton was with Wilson on the previous afternoon when the latter had stopped the fan in the mine, after the men quit work (Rec., 65), and on the morning in question he had helped to start the fan (Rec., 35, 65, 83) and therefore knew that the gas had been accumulating in the west roadway over night.

Furthermore, the testimony of Callegaro and Bromley (Rec., 76-7) shows that an explosion had previously occurred in this very roadway, and that Fulton knew about it; also that he had shown Bromley how the gas could be set off with a miner's lamp.

None of the foregoing testimony is disputed or contradicted by a syllable of evidence in the record. It establishes beyond the possibility of doubt Fulton's acquaintance with the gaseous condition of the west roadway and the risk he ran in entering it with an open lamp, and such being the case, his act was willful under the definition of that term adopted by the Illinois Supreme Court.

> "'Willful' is a word of familiar use in every branch of law and although in some branches of law it may have a special meaning it generally, as used in courts of law implies nothing blamable but merely that the person of whose act or default of expression is used as a free agent and that what has been done arises from

> the spontaneous action of law. It means but nothing more than this, that he knows what he is doing, and intends to do, what he is doing, and is a free agent. (29 Am. & Eng. Enc. of Law, 113.) An act *consciously* omitted is *wilfully* omitted, in the meaning of the word willful as used in these enactments of our Legislature relative to the duty of miners. In *Carterville Coal Co.* v. *Abbott,* 181 Ill., 495, we said (p. 502): 'Where an owner, operator or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act he wilfully disregards its provisions and wilfully disregards the safety of miners employed therein.' '' (*Odin Coal Co.* v. *Denman,* 185 Ill., 413.)

See also *Southern Ry. Co.* v. *Carroll,* 138 Fed. Rep., 638, holding that where a traveler, knowing of the existence of a roailroad crossing, approached it at night in a carriage with drawn side curtains, without looking or listening for the approach of a train, which was within sight and hearing, he was guilty of *willful* negligence, such as barred him from recovery therein.

Fulton's willful act, therefore, in entering the west roadway with full knowledge of its condition and the risks involved, both to himself and to others and to the mine, constituted an unlawful act under the concluding provision of Section 31 of the Mining Statute, and absolutely barred him from a recovery herein, under the familiar doctrine that when a plaintiff's own unlawful act concurs in causing the damage that he complains of, he cannot recover therefor. See, for a full exposition of this doctrine, the authorities cited under IV of the Brief of Argument. The Illinois rule that contrib-

utory negligence is no defence to an action brought under this statute, has no application where the act of the plaintiff is one forbidden by the statute and expressly denounced as unlawful.

From whatever standpoint the evidence is viewed no cause of action against the defendant company was shown, and the court should have taken the case from the jury as requested at the close of all the evidence.

IV.

THE QUESTION OF FULTON'S UNLAWFUL ACT IN WILFULLY ENTERING THE WEST ROADWAY SHOULD HAVE BEEN SUBMITTED TO THE JURY UNDER PROPER INSTRUCTIONS.

The defendant requested the court to give to the jury the following instruction (Rec., 107):

> "You are instructed that under the laws of this state in force at the time of Samuel Fulton's death, it was unlawful for any miner or other workman in a mine to do any wilful act whereby the lives or health of persons working in mines or the security of a mine or the machinery thereof was endangered, and such unlawful act was punishable by a fine not exceeding five hundred dollars ($500), or by imprisonment in the county jail for a period not exceeding six months, or both, at the discretion of the court. You are further instructed that if you believe from the evidence that Samuel Fulton at the time he was killed was engaged in a wilful act which endangered the lives or health of persons working in the mine with him, or the security of the mine or its machinery, and that such wilful act on his part contributed to his death, then the plaintiff cannot recover in this action."

The foregoing instruction is based upon Sections 31 and 33 of the statute, and the first half is substantially a quotation from the language employed in the Act. The Act says in express terms that any wilful act, such as that described in the instruction, shall be unlawful, and we are at a loss to understand why the court refused to submit to the jury the question whether or not Fulton's conduct preceding his death constituted such wilful act. There was certainly sufficient evidence to go to the jury of experience and explicit knowledge on his part as to the conditions prevailing in the west roadway, and also a categorical denial by Wilson of Schmitz' charge that he had ordered Fulton into this roadway. The court's refusal is the more surprising in view of its submission to the jury of the question whether Fulton was cautioned by Wilson not to enter the west roadway until the fan had cleared the gas therefrom and Wilson had run up with a safety lamp and tested the air, and its instruction that if such caution was given and was disregarded by Fulton and his death resulted therefrom, then the plaintiff could not recover. (Rec., 97.) Certainly, if the latter instruction was proper under Section 31 of the Act, the refused instruction now in question was equally appropriate. In fact, both instructions were proper and should have been given to the jury, for it cannot be questioned that under the familiar doctrine already alluded to, if the unlawful act denounced by the statute was done by Fulton and contributed to his death, the plaintiff could not recover in this action.

Another instruction along this same line which

was asked and improperly refused by the court (Rec., 107) was that referred to in the 37th assignment of error, to the effect that no recovery could be had if Fulton's death resulted in part from his own reckless disregard of consequences in view of his surroundings and knowledge of the conditions in the mine as disclosed by the evidence. While the Act does not in terms declare a reckless disregard of consequences unlawful, and it could not, therefore, perhaps, be relied upon as a defense under Section 31, still such conduct would be clearly *willful,* and sufficient to bar a claim against the defendant for *willful* violation of the statute. While the Illinois courts have held mere contributory negligence no defense to an action under this Act, they have never declared that willful conduct on plaintiff's part would not bar recovery thereunder, and it would seem, upon principle, that if, as is the law even in Illinois, ordinary contributory negligence, is a defense to ordinary negligence, then plaintiff's willful conduct should constitute a defense to defendant's willful conduct, where it contributes to the injury. Whether viewed as generally reckless and willful, or as willful within the definition of Section 31, Fulton's conduct should bar the plaintiff's recovery, but the jury were given no opportunity to pass upon either question.

V.

THE JURY SHOULD HAVE BEEN INSTRUCTED THAT NO RECOVERY COULD BE HAD UNDER THE SECOND, THIRD, FIFTH AND SIXTH COUNTS OF THE DECLARATION BECAUSE OF THE ABSENCE OF ANY EVIDENCE TO SUSTAIN THEM UNDER A PROPER CONSTRUCTION OF THE STATUTE.

Second and Third Counts. (Rec., 5-6.)

These counts charge the defendant with wilfully failing to provide "cross-cuts" and "stoppings" in the mine. It conclusively appears from the evidence, however, without any attempt at contradiction, that the defendant's mine in question was a "long-wall" mine, so-called, in which kind of mines "cross-cuts" and "stoppings" are unknown, it being only "room and pillar" mines, which are constructed with parallel entries, in which "cross-cuts" and "stoppings" are used. (Rec., 32, 41-3.) The statute, therefore, had no application in this respect to the defendant's mine, and the court, for the purpose of simplifying the intricate issues before the jury, and removing from their consideration questions of fact which were not legally before them under a proper construction of the Mining Act, should have eliminated these two counts, and also the fifth and sixth, hereinafter next dnscussed, by granting defendant's motion to strike out these counts, made at the close of plaintiff's case (Rec., 61), or defendant's request for instructions to that effect. (Rec., 102.)

Fifth Count. (*Rec.,* 20.)

This count charges that the defendant permitted Fulton to enter the mine to work therein before the dangerous gas had been removed and the mine made safe, said Fulton not being then and there under the direction of said defendant's mine manager. This charge is based upon Section 18 (b) of the Act, providing that no one shall be allowed to enter the mine to work therein *except under the direction of the mine manager* until all conditions shall have been made safe.

Undisputed evidence shows that Fulton was in the mine on this Sunday morning under direction of the mine manager, Wilson. That Wilson was present in the mine before and at the time of the accident is conceded. Furthermore, he testifies (Rec., 64, 65) that on the preceding afternoon he had a conversation with Fulton in the mine, in which Fulton asked if it would not be well for him to get some of his work ahead, he then being behind in his track laying, and Wilson told him "Yes, it would be all right." Fulton accordingly came to the mine on the following morning, where Wilson saw him at the top of the shaft and assisted him in carrying props, switch points, etc., down the shaft. At the bottom of the shaft, just before the accident, Wilson had a further conversation with Fulton, which he details as follows:

"The conversation I had with Fulton was in regard to the directions of this roadway" (*i. e.*, the west roadway where Fulton was killed). "They got off the bearing a little too much to the right. I directed them to keep close to the right-hand side and keep it to the proper course. The track was laid

past (indicating) the point marked D (indicating). Our conversation was in regard to the course of that road. I was telling him to put the track so as to get it back to its regular course and after we had talked the matter over he wanted to know if there was not going to be some one to help him. I said, 'Yes, I will give you Schmitz,'" etc.

This testimony is no where contradicted. On the contrary, Schmitz' testimony, upon which plaintiff strongly relied, was to the effect that Fulton was ordered into the west roadway by Wilson just prior to his death. That Fulton was in the mine that morning under the mine manager's direction must, therefore, be conceded, and such being the case the charge to the contrary in the fifth count was fully negatived, and the question of liability involved therein should not, therefore, have been submitted to the jury. (Rec., 61, 103.)

There is another error alleged in connection with this fifth count which may be conveniently discussed at this point.

The provisions of Section 18 (b) of the Act that "no one shall be allowed to remain in any part of the mine through which gas is being carried into the ventilating currents, nor to enter the mine to work therein except under the direction of the mine manager, until all conditions shall have been made safe," clearly implies that one acting under the direction of the mine manager shall be allowed to remain in a part of the mine through which gas is being carried into the ventilating current, or to enter the mine to work therein before all conditions shall have been made safe. Unless thus interpreted the

proviso, "except under the direction of the mine manager," is meaningless. We contend that, it appearing in this case that Fulton, in entering the mine to work in the west roadway where gas was being carried at the time by the fan into the ventilating current, was acting under the immediate direction and in the presence of the mine manager, Wilson, no liability exists as against the defendant for his death occurring under such circumstances and by reason thereof. In any event, the defendant was entitled to have the jury instructed that if they found that Fulton, in so entering the mine, was acting under the direction of the mine manager, they should find the defendant not guilty. This request was made of the court (Rec., 107) and refused, and we insist that error was committed thereby.

Sixth Count. (*Rec.*, 22.)

Plaintiff's sixth count is based upon Section 16(b) of the Act requiring the mine manager to keep a careful watch over all ventilating apparatus and the air currents in the mine, and in case of accident to fan or machinery by which the currents are obstructed or stopped, to at once order the withdrawal of the men and prohibit their return until thorough ventilation has been re-established.

It would seem to be too clear to require argument that the contingency referred to in the foregoing provision is some sudden and unexpected casualty or event occurring while the mine and its ventilating machinery is in operation which obstructs, or altogether stops the air currents which are serving the miners at their work, thereby endangering their

lives and safety. The reference to the *re-establishment* of the ventilation by its very terms implies the existence of ventilation before the accident in question.

In support of this count evidence was introduced that when the men entered the mine that Sunday morning the monkey wrench which was customarily used upon the stem of the pump valve in place of the wheel, which was originally attached thereto, to turn it and let steam into the pipe which led to the fan, was missing, and that a delay of a few moments was thereby caused while Wilson went to the top of the shaft and procured another monkey wrench for the purpose stated. (Rec., 54,65.)

This is the sum and substance of plaintiff's evidence in support of the charge of an accident to the fan and machinery, and it is uncontradicted. There is no evidence whatever that any currents in the mine were obstructed or stopped, and there could not be, for it is conceded that there were at the time no currents of air in the mine, as the fan was not then in operation and had not been since the middle of the preceding afternoon. The incident was wholly devoid of any danger to the men in the mine, as they merely waited at the foot of the shaft until the fan had been started and the ventilation begun. The loss of the monkey wrench was, at the most, an accident which delayed the starting of the fan or machinery in the mine and of the air currents resulting therefrom, as to which no prohibition or duty is imposed by the Act. Under the strict construction which must be placed upon this mining statute, with its numerous requirements in derogation of the com-

mon law, it cannot be held that the incident referred to was a violation of the Act for which the defendant should be held liable.

Upon this question of strict construction, we call attention to the following authorities:

In *Cole* v. *Mayne*, 122 Fed. R., at 843, the court says, in reference to the Missouri Mining Act then under consideration, quoting from *Hamilton* v. *Jones*, 125 Ind., 178:

> "Statutes in derogation of the common law are to be construed strictly, and one who seeks to maintain an action which was within the prohibition of the common law must be able to point to a statute which in plain and explicit terms authorizes the action to be maintained. A plaintiff who sues on a right of action given by statute must present a case clearly within the statute which creates the right."
>
> "No statute is to be construed as altering the common law as making any innovation upon the common law which it does not fairly express."
>
> *Shaw* v. *Railroad Co.*, 101 U. S., at 565.

"Again, this act of Congress changes the common law. Before its enactment, servants coupling cars used in interstate commerce without automatic couplers assumed the risk and danger of that employment, and carriers were not liable for injuries which their employes suffered in the discharge of this duty. Since its passage the employes no longer assume this risk and, if they are free from contributory negligence, they may recover for the damages they sustain in this work. A statute which thus changes the common law must be strictly construed. The common or the general law is not further abrogated by such a statute than the clear import of its lan-

guage necessarily requires. *Shaw* v. *Railroad Co.*, 101 U. S., 557, 565; 25 L. Ed., 892; *Fitzgerald* v. *Quann*, 109 N. Y., 441, 445; 17 N. E., 354; *Brown* v. *Barry*, 3 Dall., 365, 367; 1 L. Ed., 638.

Johnson v. *Southern Pacific Co.*, 117 Fed. Rep., at 466.

We contended before the trial court that the proper construction of the provision of the Mining Act referred to required an instruction to the jury that no recovery could be had under this sixth count and that it should be stricken from the pleadings submitted to the jury. The court, however, refused to give such instruction or motion (Rec., 61, 103) and further error is assigned thereon.

Upon the foregoing considerations we submit that the Illinois Mining Act of 1899, as interpreted by the Illinois Supreme Court, is wholly unconstitutional and void and gave no right of action in this case. Should the court, however, sustain the Act, then we insist that material errors were committed upon the trial of the case in the Circuit Court in repect to the matters argued herein which call for its reversal.

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APPENDIX.

AN ACT *to revise the laws in relation to coal mines and subjects relating thereto, and providing for the health and safety of persons employed therein. In force July 1, 1899.*

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

MAPS OR PLANS OF MINES.

MAPS NECESSARY. (*a*) That the operator of every coal mine in this State shall make, or cause to be made, an accurate map or plan of such mine, drawn to a scale not smaller than 200 feet to the inch, and as much larger as practicable, on which shall appear the name, the state, county and township in which the mine is located, the designation of the mine, the name of the company or owner, the certificate of the mining engineer or surveyor as to the accuracy and date of the survey, the north point and the scale to which the drawing is made.

SURFACE SURVEY. (*b*) Every such map or plan shall correctly show the surface boundary lines of the coal rights pertaining to each mine, and all sections or quarter section lines or corners within the same; the lines of town lots and streets, the tracks and sidetracks of all railroads, and the location of all wagon roads, rivers, streams, ponds, buildings, landmarks and principal objects on the surface.

UNDERGROUND SURVEY. (*c*) For the underground workings said maps shall show all shafts, slopes, tunnels or other openings to the surface or to the workings of a contiguous mine; all excavations, entries, rooms and cross-cuts; the location of the fan or furnace and the direction of the air currents; the location of pumps, hauling engines, engine planes, abandoned works, fire walls and standing water; and the boundary line of any surface outcrop of the seam.

MAP FOR EVERY SEAM. (*d*) A separate and similar map, drawn to the same scale in all cases, shall be made of each and every seam, which, after the passage of this act, shall be worked in any mine, and the maps of all such seams shall show all shafts, inclined planes, or other passageways connecting the same.

SEPARATE MAP FOR THE SURFACE. (*e*) A separate map shall also be made of the surface whenever the surface buildings, lines or objects are so numerous as to obscure the details of the mine workings if drawn upon the same sheet with them, and in such case the surface map shall be drawn on transparent cloth or paper, so that it can be laid upon the map of the underground workings, and thus truly indicate the local relation of lines and objects on the surface to the excavations of the mine.

THE DIP. (*f*) Each map shall also show by profile drawing and measurements, in feet and decimals thereof, the rise and dip of the seam from the bottom of the shaft in either direction to the face of the workings.

COPIES FOR INSPECTORS AND RECORDERS. (*g*) The originals or true copies of all such maps shall be kept in the office at the mine, and true copies thereof shall also be furnished to the State Inspector of Mines for the district in which said mine is located, and shall be filed in the office of the recorder of the county in which the mine is located, within thirty days after the completion of the same. The maps so delivered to the inspector shall be the property of the State and shall remain in the custody of said inspector during his term of office, and be delivered by him to his successor in office; they shall be kept at the office of the inspector and be open to the examination of all persons interested in the same, but such examination shall only be made in the presence of the inspector, and he shall not permit any copies of the same to be made without the written consent of the operator or the owner of the property.

ANNUAL SURVEYS (*h*) An extension of the last preceding survey of every mine in active operation shall be made once in every twelve months prior to July 1, of every year, and the result of said survey, with the date thereof, shall be promptly and accurately entered upon the original maps and all copies of the same, so as to show all changes in plan or new work in the mine, and all extensions of the old workings to the most advanced face or boundary of said workings, which have been made since the last preceding survey. The said changes and extensions shall be entered upon the copies of the maps in the hands of the said inspector and recorder, within 30 days after the last survey is made.

ABANDONED MINES. (*i*) When any coal mine is

worked out or is about to be abandoned or indefinitely closed, the operator of the same shall make or cause to be made a final survey of all parts of such mine, and the results of the same shall be duly extended on all maps of the mine and copies thereof, so as to show all excavations and the most advanced workings of the mine, and their exact relation to the boundary or section lines on the surface.

Special survey. (*j*) The State Inspector of mines may order a survey to be made of the workings of any mine, and the results to be extended on the maps of the same and the copies thereof, whenever, in his judgment, the safety of the workmen, the support of the surface, the conservation of the property or the safety of an adjoining mine requires it.

Penalty for failure. (*k*) Whenever the operator of any mine shall neglect or refuse, or, for any cause not satisfactory to the mine inspector, fail, for the period of three months, to furnish to the said inspector and recorder the map or plan of such mine or a copy thereof, or of the extensions thereto, as provided for in this act, the inspector is hereby authorized to make or cause to be made, an accurate map or plan of such mine at the expense of the owner thereof, and the cost of the same may be recovered by law from the said operator in the same manner as other debts by suit in the name of the inspector and for his use, and a copy of the same shall be filed by him with said recorder.

THE MAIN SHAFT.

§ 2. SINKING SUBJECT TO INSPECTION. (*a*) Any shaft in process of sinking, and any opening projected for the purpose of mining coal, shall be subject to the inspection of the State Inspector of Mines for the district in which said shaft or opening is located.

PASSAGEWAY AROUND THE BOTTOM. (*b*) At the bottom of every shaft and at every caging place therein, a safe and commodious passageway must be cut around said landing place to serve as a traveling way by which men or animals may pass from one side of the shaft to the other without passing under or on the cage.

GATES AT THE TOP. (*c*) The upper and lower landings at the top of each shaft, and the opening of each intermediate seam from or to the shaft, shall be kept clear and free from loose materials, and shall be securely fenced with automatic or other gates, so as to prevent either men or materials from falling into the shaft.

GENERAL EQUIPMENT. (*d*) Every hoisting shaft must be equipped with substantial cages fitted to guiderails running from the top to the bottom. Said cages must be safely constructed; they must be furnished with suitable boiler-iron covers to protect persons riding thereon from falling objects; they must be equipped with safety catches. Every cage on which persons are carried must be fitted up with iron bars or rings in proper place and sufficient number to furnish a secure hand-hold for every person

permitted to ride thereon. At the top landing, cage supports, where necessary, must be carefully set and adjusted so as to act automatically and securely hold the cages when at rest.

THE ESCAPEMENT SHAFT.

§ 3. Two places of egress. (*a*) For every coal mine in this State whether worked by shaft, slope or drift, there shall be provided and maintained, in addition to the hoisting shaft, or other place of delivery, a separate escapement shaft or opening to the surface, or an underground communicating passageway between every such mine and some other contiguous mine, such as shall constitute two distinct and available means of egress to all persons employed in such coal mine.

The time allowed for completing such escapement shaft or making such connections with an adjacent mine, as is required by the terms of this act, shall be three months for shafts 200 feet or less in depth, and six months for shafts less than 500 feet and more than 200 feet in depth, and nine months for all other mines, slopes or drifts or connections with adjacent mines. The time to date in all cases from the hoisting of coal from the main shaft.

Unlawful to employ more than ten men.] (*b*) It shall be unlawful to employ at any one time more men than in the judgment of the inspector is absolutely necessary, for speedily completing the connections with the escapement shaft or adjacent mine; and said number must not exceed ten men at any one time for any purpose in said mine until such escapement or connection is completed.

PASSAGEWAYS TO ESCAPEMENT.] (*c*) Such escapement shaft or opening, or communication with a contiguous mine as aforesaid, shall be constructed in connection with every seam of coal worked in such mine, and all passageways communicating with the escapement shaft or place of exit, from the main hauling ways to said place of exit, shall be maintained free of obstruction at least five feet high and five feet wide. Such passageways must be so graded and drained that it will be impossible for water to accumulate in any depression or dip of the same, in quantities sufficient to obstruct the free and safe passage of men. At all points where the passageway to the escapement shaft, or other place of exit, is intersected by other roadways or entries, conspicuous sign boards shall be placed, indicating the direction it is necessary to take in order to reach such place of exit.

DISTANCE FROM MAIN SHAFT.] (*d*) Every escapement shaft shall be separated from the main shaft by such extent of natural strata as may be agreed upon by the inspector of the district and the owner of the property, but the distance between the main shaft and escapement shaft shall not be less than 300 feet without the consent of the inspector, nor more than 300 feet without the consent of the owner.

BUILDINGS ON THE SURFACE.] (*e*) It shall be unlawful to erect any inflammable structure or building in the space intervening between the main shaft and the escapement shaft on the surface, or any powder magazine, in such location or manner as to jeopardize the free and safe exit of the men from the mine, by said escapement shaft, in case of fire in the main shaft buildings.

STAIRWAYS OR CAGES.] (f) The escapement shaft at every mine shall be equipped with safe and ready means for the prompt removal of men from the mine in time of danger, and such means shall be a substantial stairway set at an angle not greater than 45 degrees, which shall be provided with hand rails and with platforms or landings at each turn of the stairway.

In any escapement shaft which may, at the time of the passage of this act, be equipped with a cage for hoisting men, such cage must be suspended between guides and be so constructed that falling objects cannot strike persons being hoisted upon it. Such cage must also be operated by a steam hoisting engine, which shall be kept available for use at all times, and the equipment of said hoisting apparatus shall include a depth indicator, a brake on the drum, a steel or iron cable and safety catches on the cage.

OBSTRUCTIONS IN SHAFT.] (g) No accumulation of ice, nor obstructions of any kind shall be permitted in any escapement shaft, nor shall any steam, or heated or vitiated air be discharged into said shaft; and all surface or other water which flows therein shall be conducted by rings or otherwise to receptacles for the same, so as to keep the stairway free from falling water.

WEEKLY INSPECTIONS.] (h) All escapement shafts and the passageways leading thereto, or to the works of a contiguous mine, must be carefully examined at least once a week by the mine manager, or a man specially delegated by him for that purpose, and the

date and findings of such inspection must be duly entered in the record book in the offices at the mine. If obstructions are found, their location and nature must be stated together with the date at which they are removed.

COMMUNICATION WITH ADJACENT MINE.] (i) When operators of adjacent mines have, by agreement, established underground communication between said mines, as an escapement outlet for the men employed in both, the roadways to the boundary on either side shall be regularly patrolled and kept clear of every obstruction to travel by the respective operators, and the intervening door shall remain unlocked and ready at all times for immediate use.

When such communication has once been established between contiguous mines, it shall be unlawful for the operator of either mine to close the same without the consent both of the contiguous operator and of the State Inspector for the district: *Provided,* that, when either operator desires to abandon mining operations, the expense and duty of maintaining such communication shall devolve upon the party continuing operations and using the same.

THE ENGINE AND BOILER HOUSE.

§ 4. LOCATION.] (a) Any building erected after the passage of this act, for the purpose of housing the hoisting engine or boilers at any shaft, shall be substantially fire-proof, and no boiler house shall be nearer than 60 feet to the main shaft or opening or to any building or inflammable structure connecting therewith.

BRAKE ON DRUM.] (b) Every hoisting engine shall be provided with a good and sufficient brake on the drum, so adjusted that it may be operated by the engineer without leaving his post at the levers.

FLANGES.] (c) Flanges shall be attached to the sides of the drum of any engine used for hoisting men, with a clearance of not less than four inches when the whole rope is wound on the drum.

CABLE FASTENINGS.] (d) The ends of the hoisting cables shall be well secured on the drum, and at least two and a half laps of the same shall remain on the drum when the cage is at rest at the lowest caging place in the shaft.

INDICATOR.] (e) An index dial or indicator, to show at all times the true position of the cages in the shaft, shall be attached to every hoisting engine for the constant information and guidance of the engineer.

SIGNALS.] (f) The code of signals as provided for in this act, shall be displayed in conspicuous letters at some point in front of the engineer when standing at his post.

GAUGES.] (g) Every boiler shall be provided with a steam gauge, except when two or more boilers are equipped and connected with a steam drum, properly connected with the boilers to indicate the steam pressure, and another steam gauge shall be attached to the steam pipe in the engine house, the two to be placed in such positions that both the engineer and fireman can readily see what pressure is being carried. Such steam gauges shall be kept in good order and adjusted and be tested as often at least as every six months.

SAFETY VALVES.] (h) Every boiler or battery of boilers shall be provided with a safety valve of sufficient area for the escape of steam, and with weights and springs properly adjusted.

INSPECTION OF BOILERS.] (i) All boilers used in generating steam in and about coal mines shall be kept in good order, and the operator of every coal mine where steam boilers are in use shall have said boilers thoroughly examined and inspected by a competent boilermaker or other qualified person, not an employe, of said operator, as often as once in every six months, and oftener if the inspector shall deem it necessary, and the result of every such inspection shall be reported on suitable blanks to said inspector.

THE POWDER HOUSE.

§ 5. All blasting powder and explosive material must be stored in a fire-proof building on the surface, located at a safe distance from all other buildings.

THE STATE MINING BOARD.

§ 6. MANNER AND PURPOSE OF APPOINTMENT.] For the purpose of securing efficiency in mine inspection service, and a high standard of qualification in those who have the management and operation of coal mines, the State Commissioners of Labor shall appoint a board of examiners, to be known as the State Mining Board, whose duty it shall be to make formal inquiry into and pass upon the practical and technical qualifications and personal fitness of men seeking appointments as State inspectors of mines,

and of those seeking certificates of competency as mine managers, hoisting engineers and as mine examiners.

This board shall be composed of five members, two of whom shall be practical coal miners, one an expert mining engineer, and who shall, when practicable, be also a hoisting engineer, and two shall be coal operators.

DATE AND TERM OF APPOINTMENT.] (b) Their appointment shall date from July 1, 1899, and they shall serve for a term of two years, or until their successors are appointed and qualified; they shall organize by the election of one of their number as president, and some suitable person, not a member, as secretary, after which they shall all be sworn to a faithful performance of their duties.

SUPPLIES FURNISHED BY SECRETARY OF STATE.] (c) The Secretary of State shall assign to the use of the board suitably furnished rooms in the State House for such meetings as are held at the Capitol, and shall also furnish whatever blanks, blank books, printing and stationery the board may require in the discharge of its duties.

FREQUENCY OF MEETINGS.] (d) The board shall meet at the Capitol in regular session on the second Tuesday in September of the year 1899, and biennially thereafter, for the examination of candidates for appointment as State inspectors of mines; for the examination of persons seeking certificates of competency as mine managers, hoisting engineers and mine examiners. The board shall hold meetings at such times and places within the State as shall,

in the judgment of the members, afford the best facilities to the greatest number of probable candidates. Special meetings may also be called by the Commissioners of Labor whenever, for any reason, it may become necessary to appoint one or more inspectors. Public notice shall be given through the press or otherwise, announcing the time and place at which examinations are to be held.

RULES OF PROCEDURE.] (e) The examinations herein provided for shall be conducted under such rules, conditions and regulations as the members of the board shall deem most efficient for carrying into effect the spirit and intent of this act. Such rules, when formulated, shall be made a part of the permanent record of the board and such of them as relate to candidates shall be published for their information and goverance prior to each examination; they shall also be of uniform application to all candidates.

EXAMINATIONS.

§ 7. FOR INSPECTORS.] (a) Persons coming before the State Mining Board as candidates for appointment as State Inspectors of Mines must produce evidence satisfactory to the board that they are citizens of this State, at least thirty years of age, that they have had a practical mining experience of ten years, and that they are men of good repute and temperate habits; they must also submit to and satisfactorily pass an examination as to their practical and technical knowledge of mining engineering and mining machinery and appliances, of the proper development and operation of coal mines, of

ventilation in mines, of the nature and properties of mine gases, of the geology of the coal measures in this State and of the laws of this State relating to coal mines.

NAMES CERTIFIED TO THE GOVERNOR.] (b) At the close of each examination for inspectors the board shall certify to the Governor the names of all candidates who have received a rating above the minimum fixed by the rules of the board as properly qualified for the duties of inspectors.

INSPECTORS APPOINTED.] (c) From those so named the Governor shall select and appoint seven State inspectors of mines; that is to say, one inspector for each of the seven inspection districts provided for in this act, or more, if, in the future, additional inspection districts shall be created, and their commissions shall be for a term of two years from October first: *Provided,* that any one who has satisfactorily passed two of the State examinations for inspectors, and who has served acceptably as State Inspector for two full terms, upon making written application to the board setting forth the facts, shall also be certified to the Governor as a person properly qualified for appointment. But no man shall be eligible for appointment as a State Inspector of Mines who has any pecuniary interest in any coal mine, either as owner or employe.

FOR MINE MANAGERS.] (d) Persons coming before the board for certificates of competency as mine managers must produce evidence satisfactory to the board that they are citizens of this State, at least twenty-four years of age, that they have had at least four years of practical mining experience,

and that they are men of good repute and temperate habits; they must also submit to and satisfactorily pass such an examination as to their experience in mines and in the management of men, their knowledge of mine machinery and appliances, the use of surveying and other instruments, the properties of mine gases, the principles of ventilation and the specific duties and responsibilities of mine managers, as the board shall see fit to impose.

For hoisting engineers.] (e) Persons seeking certificates of competency as hoisting engineers must produce evidence satisfactory to the board that they are citizens of the United States, at least twenty-one years of age, that they have at least two years' experience as firemen or engineer of a hoisting plant, and are of good repute and temperate habits. They must be prepared to submit to and satisfactorily pass an examination as to their experience in handling hoisting machinery, and as to their practical and technical knowledge of the construction, cleaning and care of steam boilers, the care and adjustment of hoisting engines, the management and efficiency of pumps, ropes and winding apparatus, and their knowledge of the laws of this State in relation to signals and the hoisting and lowering of men at mines.

For mine examiners.] (f) Persons seeking certificates of competency as mine examiners must produce evidence satisfactory to the board that they are citizens of this State, at least twenty-one years of age, and of good repute and temperate habits. They must be prepared to submit to and satisfactorily pass an examination as to their experience in mines

generating dangerous gases, their practical and technical knowledge of the nature and properties of fire-damp, the laws of ventilation, the structure and uses of the safety lamps, and the laws of this State relating to safeguards against fires from any source in mines.

CERTIFICATES.

§ 8. ISSUED BY THE BOARD.] (a) The certificates provided for in this act shall be issued under the signatures and seal of the State Mining Board, to all those who receive a rating above the minimum fixed by the rules of the board; such certificate shall contain the full name, age and place of birth of the recipient, and the length and nature of his previous service in or about coal mines.

REGISTER TO BE PRESERVED.] (b) The board shall make and preserve a record of the names and addresses of all persons to whom certificates are issued, and at the close of each examination shall make report of the same to the Commissioners of Labor, who shall cause a permanent register of all certificated persons to be made and kept for public inspection in the office of the State Bureau of Labor Statistics in the State capitol.

EFFECT OF CERTIFICATES.] (c) The certificates provided for in this act shall entitle the holders thereof to accept and discharge the duties for which they are thereby declared qualified, at any mine in this State where their services may be desired.

FOREIGN CERTIFICATES.] (d) The board may exercise its discretion in issuing certificates of any class, but not without examination, to persons pre-

senting, with proper credentials, certificates issued by competent authority in other states.

UNLAWFUL TO EMPLOY OTHER THAN CERTIFICATED MINE MANAGERS.] (e) It shall be unlawful for the operator of any coal mine to employ, or suffer to serve, as mine manager at his mine, any person who does not hold a certificate of competency issued by a duly authorized Board of Examiners of this State: *Provided,* that whenever any exigency arises by which it is impossible for any operator to secure the immediate services of a certified mine manager, he may place any trustworthy and experienced man, subject to the approval of the State inspector of the district, in charge of his mine, to act as temporary mine manager for a period not exceeding 30 days.

UNLAWFUL TO EMPLOY OTHER THAN CERTIFICATED HOISTING ENGINEERS.] (f) It shall be unlawful for the operator of any mine to employ, or suffer to serve, as hoisting engineer for said mine, any person who does not hold a certificate of competency issued by a duly authorized Board of Examiners of this State, or permit any other to operate his hoisting engine except for the purpose of learning to operate it, and then only in the presence of the certified engineer in charge, and when men are not being hoisted or lowered: *Provided,* that whenever any exigency arises by which it is impossible for any operator to secure the immediate services of a certificated hoisting engineer, he may place any trustworthy and experienced man, subject to the approval of the State Inspector of the district, in charge of his engines, to act as temporary engineer, for a period of not to exceed 30 days.

UNLAWFUL TO EMPLOY OTHER THAN CERTIFICATED MINE EXAMINERS.] (g) It shall be unlawful for the operator of any mine to employ, or suffer to serve, as mine examiner, any person who does not hold a certificate of competency issued by the State Mining Board: *Provided,* that any one holding a mine manager's certificate may serve as mine examiner. Any one holding a certificate as fire boss, on presentation of the same to the State Mining Board, may have it exchanged for a mine examiner's certificate.

CANCELLATION OF CERTIFICATES.] (h) The certificate of any mine manager, hoisting engineer or mine examiner may be cancelled and revoked by the State Mining Board whenever it shall be established to the satisfaction of said board that the holder thereof has become unworthy of official endorsement, by reason of violations of the law, intemperate habits, manifest incapacity, abuse of authority, or for other causes satisfactory to said board: *Provided,* that any person against whom charges or complaints are made shall have an opportunity to be heard in his own behalf. And he shall have 30 day's notice in writing of such charges.

FEES FOR EXAMINATIONS.

§ 9. An applicant for any certificate herein provided for, before being examined, shall register his name with the secretary of the board, and file with him the credentials required by this act, to-wit: an affidavit as to all matters of fact establishing his right to receive the examination, and a certificate of good character and temperate habits signed by at least ten of the citizens who know him best in the place in which he lives.

Each candidate, before receiving the examination, shall pay to the secretary of the board the sum of one dollar as an examination fee, and those who pass the examination for which they are entered, before receiving their certificates, shall also pay to the secretary the further sum of $2 each as a certificate fee. All such fees shall be duly accounted for by the board, and covered into the State treasury at the close of each fiscal year.

PAY OF THE BOARD.

§ 10. The members of the State Mining Board shall receive as compensation for their services the sum of $5 each per day, for a term not exceeding 100 days in any one year, and whatever sums are necessary to reimburse them for such traveling expenses as may be incurred in the discharge of their duties.

The salary of the secretary shall be determined by the board, but shall in no case exceed the sum of $1,000 per annum, and he shall be reimbursed for any amounts expended for actual and necessary traveling expenses in the discharge of his duties. All such salaries and expenses of the board and of its secretary shall be paid upon vouchers duly sworn to by each and approved by the president of the board and by the Governor, and the Auditor of Public Accounts is hereby authorized to draw his warrants on the State Treasury for the amounts thus shown to be due, payable out of any money in the treasury not otherwise appropriated.

INSPECTION DISTRICTS (OMITTED).

DUTIES OF INSPECTORS.

§ 12. BOND.] (a) Those who receive appointment as State Inspectors of Mines must, before entering upon their duties, as such, take an oath of office, as provided for by the constitution, and enter into a bond to the State in the sum of five thousand ($5,000) dollars, with sureties to be approved by the Governor, conditioned upon the faithful performance of their duties in every particular as required by this act; said bond, with the approval of the Governor endorsed thereon, together with the oath of office, shall be deposited with the Secretry of State.

INSTRUMENTS.] (b) For the more efficient discharge of the duties herein imposed upon them, each inspector shall be furnished at the expense of the State with an anemometer, a safety lamp and whatever other instruments may be required in order to carry into effect the provisions of this act.

EXAMINATIONS OF MINES.] (c) State Inspectors of Mines shall devote their whole time and attention to the duties of their office, and make personal examination of every mine within their respective districts, and shall see that every necessary precaution is taken to insure the health and safety of the workmen employed in such mines, and that the provisions and requirements of all the mining laws of this State are faithfully observed and obeyed, and the penalties for the violation of the same promptly enforced.

AUTHORITY TO ENTER.] (d) It shall be lawful for State Inspectors to enter, examine and inspect any and all coal mines and the machinery belonging thereto, at all reasonable times, by day or by night, but so as not to obstruct or hinder the necessary workings of such coal mine, and the operator of every such coal mine is hereby required to furnish all necessary facilities for making such examination and inspection.

PROCEDURE IN CASE OF OBJECTION.] (e) If any operator shall refuse to permit such inspection or to furnish the necessary facilities for making such examination and inspection, the inspector shall file his affidavit, setting forth such refusal, with the judge of the circuit court in said county in which said mine is situated, either in term time or vacation, or, in the absence of said judge, with the master in chancery in said county in which said mine is situated, and obtain an order on such owner, agent or operator so refusing as aforesaid, commanding him to permit and furnish such necessary facilities for the inspection of such coal mine, or to be adjudged to stand in contempt of court and punished accordingly.

NOTICES TO BE POSTED.] (f) The State Inspector of Mines shall post up in some conspicuous place at the top of each mine visited and inspected by him, a plain statement of the condition of said mine, showing what in his judgment is necessary for the better protection of the lives and health of persons employed in said mine; such statement shall give the date of inspection and be signed by the inspector. He shall also post a notice at the landing used by

the men, stating what number of men will be permitted to ride on the cage at one time, and at what rate of speed men may be hoisted and lowered on the cages. He must observe especially that a proper code of signals between the engineer and top man and bottom man is established and conspicuously posted for the information of all employes.

SEALER OF WEIGHTS.] (g) State Inspectors of Mines are hereby made *ex officio* sealer of weights and measures in their respective districts, and as such are empowered to test all scales used to weigh coal at coal mines. Upon the written request of any mine owner or operator, or of ten coal miners employed at any one mine, it shall be his duty to try and prove any scale or scales at such mine against which complaint is directed, and if he shall find that they or any of them do not weigh correctly, he shall call the attention of the mine owner or operator to the fact, and direct that said scale or scales be at once overhauled and readjusted so as to indicate only true and exact weights, and he shall forbid the further operation of such mine until such scales are adjusted. In the event that such tests shall conflict with any test made by any county sealer of weights, or under and by virtue of any municipal ordinance or regulation, then the test by such mine inspector shall prevail.

TEST WEIGHTS.] (h) For the purpose of carrying out the provisions of this act each inspector shall be furnished by the State with a complete set of standard weights suitable for testing the accuracy of track scales, and of all smaller scales at mines; said test weights to be paid for on bills of particu-

lars, certified by the Secretary of State and approved by the Governor. Such test weights shall remain in the custody of the inspector for use at any point within his district, and for any amounts expended by him for the storage, transportation or handling of the same, he shall be fully reimbursed upon making entry of the proper items in his quarterly expense voucher.

INSPECTORS' ANNUAL REPORTS.] (i) Each State Inspector of Mines shall, at the close of the official year, to-wit: After June 30, of every year, prepare and forward to the secretary of the Bureau of Labor Statistics a formal report of his acts during the year in the discharge of his duties, with any recommendations as to legislation he may deem necessary on the subject of mining, and shall collect and tabulate upon blanks furnished by said secretary all desired statistics of mines and miners within his district to accompany said annual report.

REPORTS TO BE PUBLISHED.] (j) On the receipt of said inspectors' reports the secretary of the Bureau of Labor Statistics shall proceed to compile and summarize the same as a report of said bureau, to be known as the Annual Coal Report, which shall be duly transmitted to the Governor for the information of the General Assembly and the public. The printing and binding of said reports shall be provided for by the Commissioners of State Contracts in like manner and in like number as they provide for the publication of other official reports to the Governor.

The Secretary of State shall furnish to said inspectors, upon the requisition of the secretary of

the State Bureau of Labor Statistics, whatever instruments, blanks, blank books, stationery, printing and supplies may be required by said inspectors in the discharge of their official duties; said instruments to be paid for on bills of particulars, certified by the Secretary of State and approved by the Governor.

It shall be the duty of every coal operator and every employer of labor in this State to afford the State Commissioners of Labor, or their representatives, every facility for procuring statistics of the wages and conditions of their employes for the purpose of compiling and publishing statistics of labor and of social and industrial conditions within the State as required by law. Any person who shall hinder or obstruct the investigation of the agents of the commissioners, or shall neglect or refuse, for a period of ten days, to furnish the information called for by the schedules of the commissioners as provided above, shall be adjudged guilty of a misdemeanor and be subjected to a fine of $100.

§ 13. Each State Inspector of Mines shall receive as compensation for his services the sum of $1,800 per annum, and for his traveling expenses the sum actually expended for that purpose, in the discharge of his official duties, both to be paid quarterly by the State Treasurer, on warrants of the Auditor of Public Accounts, from the funds in the treasury not otherwise appropriated; said expense vouchers shall show the items of expenditures in detail, with sub-vouchers for the same so far as it is practicable to obtain them. Said voucher shall be sworn to by the inspector and be approved by

the secretary of the Bureau of Labor Statistics and the Governor.

REMOVAL OF INSPECTORS.

§ 14. Upon a petition signed by not less than three coal operators, or ten coal miners, setting forth that any State Inspector of Mines neglects his duties, or that he is incompetent, or that he is guilty of malfeasance in office, or guilty of any act tending to the injury of miners or operators of mines, it will be lawful for the Commissioners of Labor of this State to issue a citation to the said inspector to appear, at not less than fifteen days' notice on a day fixed before them, when the said commissioners shall proceed to inquire into and investigate the allegations of the petitioners, and if the said commissioners find that the said inspector is neglectful of his duty, or that he is incompetent to perform the duties of said office, or that he is guilty of malfeasance in office, or guilty of any act tending to the injury of miners or operators of mines, the said commissioners shall declare the office of inspector of said district vacant, and a properly qualified person shall be duly appointed, in the manner provided for in this act, to fill said vacancy.

COUNTY INSPECTORS.

§ 15. The County Board of Supervisors, or of Commissioners in counties not under township organization, of any county in which coal is produced, upon the written request of the State Inspector of Mines for the district in which said county is located, shall appoint a County Inspector of Mines

as assistant to such State inspector; but no person shall be eligible for appointment as county inspector who does not hold a State certificate of competency as mine manager, and the compensation of such county inspector shall be fixed by the county board at not less than three dollars per day, to be paid out of the county treasury.

The State inspector may authorize any county inspector in his district to assume and discharge all the duties and exercise all the powers of a State inspector in the county for which he is appointed, in the absence of the State inspector; but such authority must be conferred in writing and the county inspector must produce the same as evidence of his powers upon the demand of any person affected by his acts; and the bond of said State inspector shall be holden for the faithful performance of the duties of such assistant inspector.

DUTIES OF MINE MANAGERS AND MINERS.

§ 16. (a) The mine manager shall instruct employes as to their respective duties, and shall visit and examine the various working places in the mine as often as practicable. He shall always provide a sufficient supply of props, caps and timber delivered on the miners' cars at the usual place where demanded, as nearly as possible, in suitable lengths and dimensions for the securing of the roof by the miners, and it shall be the duty of the miner to properly prop and secure his place with materials provided therefor.

VENTILATION.] (b) It shall be the duty of the

mine manager to see that cross-cuts are made at proper distances apart to secure the best ventilation at the face of all working places, and that all stoppings along air-ways are properly and promptly built. He shall keep careful watch over all ventilating apparatus and the air-currents in the mine, and in case of accident to fan or machinery by which the currents are obstructed or stopped, he shall at once order the withdrawal of the men and prohibit their return until thorough ventilation has been re-established.

AIR CURRENTS AND OUTLET PASSAGE-WAYS.] (c) He shall measure or cause to be measured the air-current with an anemometer at least once a week at the inlet and outlet, and shall keep a record of such measurements for the information of the inspector. Once a week he shall make a special examination of the roadways leading to the escapement shaft or other opening for the safe exit of men to the surface, and shall make a record of any obstructions to travel he may encounter therein, together with the date of their removal.

HANDLING EXPLOSIVES.] (d) He shall give special attention to and instructions concerning the proper storage and handling of explosives in the mine, and concerning the time and manner of placing and discharging the blasting shots, and it shall be unlawful for any miner to fire shots except according to the rules of the mine. In dusty mines he must see that all hauling roads are frequently and thoroughly sprinkled. He must also see that all dangerous places, above and below, are properly marked, and that danger signals are displayed wherever they are required.

CARE OF ROPES, CAGES, ETC.] (e) The mine manager or superintendent must have special attention given to the condition of the hoisting ropes; they must be carefully and frequently scrutinized. Before the men are lowered in the morning the soundness of the ropes must be tested by hoisting the cages. He must also have the cages, safety catches, pumps, sumps and stables examined frequently; he must have the mine examined every morning by the mine examiner before the men are allowed to go to work, and know that the top man and bottom man are on duty, and that sufficient lights are maintained at the top and bottom landings when the men are being hoisted and lowered.

EARLY AND LATE DUTY.] (f) The mine manager or his agent shall be at his post at the mine when the men are lowered into the mine in the morning for work; he shall by some device keep a record of the number of men lowered either for day or night shift, and he or his agent shall remain at night until all the men employed during the day shall have been hoisted out.

MAY HAVE ASSISTANTS.] (g) In mines in which the works are so extensive that all the duties devolving on the mine manager cannot be discharged by one man, competent persons may be designated and appointed as assistants to the mine manager who shall exercise his functions, under his instructions.

DUTIES OF HOISTING ENGINEERS.

§ 17. CONSTANT ATTENDANCE.] (a) The hoisting engineer at any mine, shall be in constant attendance

at his engine or boilers at all times when there are workmen underground.

Outsiders excluded.] (b) The engineer shall not permit any one to enter or to loiter in the engine room, except those authorized by their position or duties to do so, and he shall hold no conversation with any officer of the company or other person while the engine is in motion or while his attention is occupied with the signals. A notice to this effect shall be posted on the door of the engine house.

Care of engine and boilers.] (c) The engineer or some other properly authorized employe must keep a careful watch over the engine, boilers, pumps, ropes and winding appartus. He must see that his boilers are properly supplied with water, cleaned and inspected at frequent intervals, and that the steam pressure does not exceed the limit established by the boiler inspector; he shall frequently try the safety valves and shall not increase the weights on the same; he shall observe that the steam and water gauges are always in good order, and if any of the pumps, valves or gauges become deranged or fail to act he shall promptly report the fact to the proper authority.

Signals.] (d) The engineer must thoroughly understand the established code of signals, and these must be delivered in the engine room in a clear and unmistakable manner, and when he has the signal that men are on the cage he must work his engine only at the rate of speed hereafter specified in this act.

HANDLING OF ENGINE.] (e) The engineer shall permit no one to handle or meddle with any machinery under his charge, nor suffer any one who is not a certificated engineer to operate his engine, except for the purpose of learning to operate it, and then only in the presence of the engineer in charge, and when men are not on the cage.

DUTIES OF MINE EXAMINERS.

§ 18. TO ENTER AND EXAMINE ALL PLACES.] (a) A mine examiner shall be required at all mines. His duty shall be to visit the mine before the men are permitted to enter it, and, first, he shall see that the air-current is traveling in its proper course and in proper quantity. He shall then inspect all places where men are expected to pass or to work and observe whether there are any recent falls or obstructions in rooms or roadways, or accumulations of gas or other unsafe conditions. He shall especially examine the edges and accessible parts of recent falls and old gobs and air-courses. As evidence of his examination of all working places, he shall inscribe on the walls of each, with chalk, the month and the day of the month of his visit.

TO POST DANGER NOTICES.] (b) When working places are discovered in which accumulations of gas, or recent falls, or any dangerous conditions exist, he shall place a conspicuous mark thereat as notice to all men to keep out, and at once report his finding to the mine manager.

No one shall be allowed to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work

therein, except under the direction of the mine manager, until all conditions shall have been made safe.

To MAKE DAILY RECORD.] (c) The mine examiner shall make a daily record of the conditions of the mine, as he has found it, in a book kept for that purpose, which shall be preserved in the office for the information of the company, the inspector and all other persons interested, and this record shall be made each morning before the miners are permitted to descend into the mine.

VENTILATION.

§ 19. Throughout every coal mine there shall be maintained currents of fresh air sufficient for the health and safety of all men and animals employed therein, and such ventilation shall be produced by a fan, or some other artificial means.

AMOUNT OF AIR REQUIRED.] (a) The quantity of air required to be kept in circulation and passing a given point shall be not less than 100 cubic feet per minute for each person and not less than 600 cubic feet per minute for each animal in the mine, measured at the foot of the downcast, and this quantity may be increased at the discretion of the inspector whenever, in his judgment, unusual conditions make a stronger current necessary. Said currents shall be forced into every working place throughout the mine, so that all parts of the same shall be reasonably free from standing powder smoke and deleterious air of every kind.

MEASUREMENTS.] (b) The measurement of the currents of air shall be taken with an anemometer at the foot of the downcast, at the foot of the up-

cast and at the working face of each division or split of the air current. And a record of such measurements shall be made and preserved in the office, as elsewhere provided for in this act.

AIR-CURRENTS TO BE SPLIT.] (c) The main current of air shall be so split, or subdivided, as to give a separate current of reasonably pure air to every 100 men at work, and the inspector shall have authority to order separate currents for smaller groups of men, if, in his judgment, special conditions make it necessary.

VENTILATION OF STABLE.] (d) The air current for ventilating the stable shall not pass into the intake air current for ventilating the working parts of the mine.

SELF-CLOSING DOORS.] (e) All permanent doors in mines used in guiding and directing ventilating currents shall be so hung and adjusted as to close automatically.

TRAPPERS.] (f) At all principal door-ways, through which cars are hauled, an attendant shall be employed for the purpose of opening and closing said doors when trips of cars are passing to and from the workings. Places for shelter shall be provided at such door-ways to protect the attendants from being injured by the cars while attending to their duties.

CROSS-CUTS.] (g) Cross-cuts shall be made not more than 60 feet apart, and no room shall be opened in advance of the air current.

STOPPINGS.] (h) When it becomes necessary to close cross-cuts connecting the inlet and outlet air-

courses in mines generating dangerous gases, the stoppings shall be built in a substantial manner with brick or other suitable building material laid in mortar or cement, if practicable, but in no case shall they be built of lumber except for temporary purposes.

AUTHORITY OF INSPECTOR.] (i) Whenever the inspector shall find men working without sufficient air, he shall at once give the mine manager or operator notice and a reasonable time in which to restore the current, and upon his or their refusal or neglect to act promptly, the inspector may order the endangered men out of the mine.

POWDER AND BLASTING.

§ 20. No blasting powder or other explosive shall be stored in any coal mine, and no workman shall have at any time more than one 25-pound keg of black powder in the mine, nor more than three pounds of high explosives.

PLACE AND MANNER OF STORING.] (a) Every person who has powder or other explosives in a mine shall keep it or them in a wooden or metallic box or boxes securely locked, and said boxes shall be kept at least ten feet from the track, and no two powder boxes shall be kept within 50 feet of each other, nor shall black powder and high explosives be kept in the same box.

MANNER OF HANDLING.] (b) Whenever a workman is about to open a box or keg containing powder or other explosives, and while handling same he shall place and keep his lamp at least five feet dis-

tant from said explosive and in such a position that the air current cannot convey sparks to it, and no person shall approach nearer than five feet to any open box containing powder or other explosive with a lighted lamp, lighted pipe or other thing containing fire.

COPPER TOOLS.] (c) In the process of charging and tamping a hole no person shall use any iron or steel pointed needle. The needle used in preparing a blast shall be made of copper and the tamping bar shall be tipped with at least five inches of copper. No coal dust nor any material that is inflammable or that may create a spark shall be used for tamping, and some soft material must always be placed next to the cartridge or explosive.

USE OF SQUIBS.] (d) A miner who is about to explode a blast with a manufactured squib shall not shorten the match, saturate it with mineral oil nor ignite it except at the extreme end; he shall see that all persons are out of danger from the probable effects of such shot, and shall take measures to prevent any one approaching, by shouting "fire!" immediately before lighting the fuse.

NOT MORE THAN ONE SHOT AT A TIME.] (e) Not more than one shot shall be ignited at the same time in any one working place, unless the firing is done by electricity or by fuses of such length that neither of the shots will explode in less than 3 minutes from the time they are lighted. When successive shots are to be fired in any working place in which the roof is broken or faulty, the smoke must be allowed to clear away and the roof must be examined and made secure between shots.

MISSED SHOTS.] (f) No person shall return to a missed shot until 5 minutes shall have elapsed, unless the firing is done by electricity, and then only when the wires are disconnected from the battery.

DUSTY MINES.] (g) In case the galleries, roadways or entries of any mine are so dry that the air becomes charged with dust, the operator of such mine must have such roadways regularly and thoroughly sprayed, sprinkled or cleaned, and it shall be the duty of the inspector to see that all possible precautions are taken against the occurrence of explosions which may be occasioned or aggravated by the presence of dust.

PLACES OF REFUGE.

§ 21. ENGINE PLANES.] (a) On all single track hauling roads wherever hauling is done by machinery, and on all gravity or inclined planes in mines, upon which the persons employed in the mine must travel on foot to and from their work, places of refuge must be cut in the side wall not less than 3 feet in depth and 4 feet wide, and not more than 20 yards apart, unless there is a clear space of at least 3 feet between the side of the car and the side of the road, which space shall be deemed sufficient for the safe passage of men.

On every such road which is more than 100 feet in length a code of signals shall be established between the hauling engineer and all points on the road.

A conspicuous light must be carried on the front car of every trip or train of pit cars moved by machinery, except when such trip is on an inclined plane.

HAULING ROADS.] (b) On all hauling roads or gangways on which the hauling is done by draft animals, or gangways whereon men have to pass to and from their work, places of refuge must be cut in the side wall at least 2½ feet deep, and not more than 20 yards apart; but such places shall not be required in entries from which rooms are driven at regular intervals not exceeding 20 yards, and whenever there is a clear space of two and one-half feet between the car and the rib, such space shall be deemed sufficient for the safe passage of men.

All places of refuge must be kept clear of obstructions, and no material shall be stored nor be allowed to accumulate therein.

BOYS AND WOMEN.

§ 22. No boy under the age of fourteen years, and no woman or girl of any age shall be permitted to do any manual labor in or about any mine, and before any boy can be permitted to work in any mine he must produce to the mine manager or operator thereof an affidavit from his parent or guardian or next of kin, sworn and subscribed to before a justice of the peace or notary public, that he, the said boy, is fourteen years of age.

SIGNALS.

§ 23. At every mine operated by shaft and by steam power means must be provided for communicating distinct and separate signals to and from the bottom man, the top man and the engineer. The following signals are prescribed for use at mines where signals are required:

From the Bottom to the Top. One bell shall signify to hoist coal or the empty cage, and also to stop either when in motion.

Two bells shall signify to lower cage.

Three bells shall signify that men are coming up; when return signal is received from the engineer, men will get on the cage and the cager shall ring one bell to start.

Four bells shall signify to hoist slowly, implying danger.

Five bells shall signify accident in the mine and a call for a stretcher.

Six bells shall call for a reversal of the fan.

From the Top to the Bottom. One bell shall signify: All ready, get on cage.

Two bells shall signify: Send away empty cage.

Provided, that the operator of any mine may, with the consent of the inspector, add to this code of signals in his discretion, for the purpose of increasing its efficiency or of promoting the safety of the men in said mine, but whatever code may be established and in use at any mine, must be conspicuously posted at the top and at the bottom and in the engine room for the information and instruction of all persons concerned.

WEIGHING AND WEIGHMEN.

§ 24. SCALES.] (a) The operator of every coal mine where miners are paid by the weight of their output shall provide at such mine suitable and accurate scales of standard manufacture for the weighing of such coal, and a correct record shall be

kept of all coal so weighed, and said record shall be open at all reasonable hours to the inspection of miners and others interested in the product of said mine.

WEIGHMAN.] (b) The person authorized to weigh the coal and keep the record as aforesaid shall, before entering upon his duties, make and subscribe to an oath before some person duly authorized to administer oaths, that he will accurately weigh and carefully keep a true record of all coal weighed, and such affidavit shall be kept conspicuously posted at the place of weighing.

CHECK WEIGHMAN.] (c) It shall be permitted to the miners at work in any coal mine to employ a check-weighman at their option and at their own expense, whose duty it shall be to balance the scales and see that the coal is properly weighed, and that a correct account of the same is kept, and for this purpose he shall have access at all times to the beam box of said scales, and be afforded every facility for verifying the weights while the weighing is being done. The check-weighman so employed by the miners, before entering upon his duties, shall make and subscribe to an oath before some person duly authorized to administer oaths, that he will faithfully discharge his duties as check-weighman and such oath shall be kept conspicuously posted at the place of weighing.

BOUNDARIES.

§ 25. TEN-FOOT LIMIT.] (a) In no case shall the workings of any mine be driven nearer than 10 feet to the boundary line of the coal rights pertaining to

said mine, except for the purpose of establishing an underground communication between contiguous mines, as provided for elsewhere in this act.

APPROACHING OLD WORKS.] (b) Whenever the workings of any part of a mine are approaching old workings, believed to contain dangerous accumulations of water or of gas, the operator of said mine must conduct the advances with narrow work, and maintain bore holes at least 20 feet in advance of the face of the work, and such side holes as may be deemed prudent or necessary.

NOTICE TO INSPECTORS.

§ 26. Immediate notice must be conveyed to the inspector of the proper district by the operator interested:

First—Whenever an accident occurs whereby any person receives serious or fatal injury.

Second—Whenever it is intended to sink a shaft, either for hoisting or encampment purposes, or to open a new mine by any process.

Third—Whenever it is intended to abandon any mine or to reopen any abandoned mine.

Fourth—Upon the appearance of any large body of fire damp in any mine, whether accompanied by explosion or not, and upon the occurrence of any serious fire within the mine or on the surface.

Fifth—When the workings of any mine are approaching dangerously near any abandoned mine, believed to contain accumulations of water or gas.

Sixth—Upon the accidental closing or intended abandonment of any passageway to an escapement outlet.

ACCIDENTS.

§ 27. DUTY OF INSPECTOR.] (a) Whenever loss of life or serious personal injury shall occur by reason of any explosion, or of any accident whatsoever, in or connected with any coal mine, it shall be the duty of the person having charge of said mine to report that fact, without delay, to the inspector of the district in which the mine is located, and the said inspector shall, if he deem necessary from the facts reported, and in all cases of loss of life, immediately go to the scene of said accident and render every possible assistance to those in need.

It shall, moreover, be the duty of every operator of a coal mine to make and preserve for the information of the inspector, and upon uniform blanks furnished by said inspector, a record of all injuries sustained by any of his employes in the pursuance of their regular occupations.

CORONER'S INQUEST.] (b) If any person is killed by an explosion, or other accident, the operator must also notify the coroner of the county, or in his absence or inability to act, any justice of the peace of said county, for the purpose of holding an inquest concerning the cause of such death. At such inquest the inspector shall offer such testimony as he may be possessed of, and may question or cross-question any witness appearing in the case.

INVESTIGATION BY INSPECTOR.] (c) The inspector may also make any original or supplemental investigation which he may deem necessary, as to the nature and cause of any accident within his jurisdiction, and shall make a record of the circumstances

attending the same, and of the result of his investigations, for preservation in the files of his office. To enable him to make such investigation he shall have power to compel the attendance of witnesses, and to administer oaths or affirmations to them, and the cost of such investigations shall be paid by the county in which such accident has occurred, in the same manner as the costs of coroner's inquests are paid.

MEN ON CAGES.

§ 28. TOP MAN AND BOTTOM MAN.] (a) At every shaft operated by steam power, the operator must station at the top and at the bottom of such shaft a competent man, charged with the duty of attending to signals, preserving order and enforcing the rules governing the carriage of men on cages. Said top man and bottom man shall be at their respective posts of duty at least a half hour before the hoisting of coal begins in the morning, and remain for half an hour after hoisting ceases for the day.

LIGHTS ON LANDINGS.] (b) Whenever the hoisting or lowering of men occurs before daylight or after dark, or when the landing at which men take or leave the cage is at all obscured by steam or otherwise, there must always be maintained at such landing a light sufficient to show the landing and surrounding objects distinctly. Likewise, as long as there are men underground in any mine, the operator shall maintain a good and sufficient light at the bottom of the shaft thereof, so that persons coming to the bottom may clearly discern the cage and objects in the vicinity.

SPEED OF CAGES AND OTHER REGULATIONS.] (c) Cages on which men are riding shall not be lifted nor lowered at a rate of speed greater than 600 feet per minute, except with the written consent of the inspector. No person shall carry any tools, timber or other materials with him on a cage in motion, except for use in repairing the shaft, and no one shall ride on a cage containing either a loaded or empty car. No cage having an unstable or self-dumping platform shall be used for the carriage of men or materials unless the same is provided with some convenient device by which said platform can be securely locked, and unless it is so locked whenever men or materials are being conveyed thereon. No coal shall be hoisted in any shaft while men are being lowered therein.

RIGHTS OF MEN TO COME OUT.] (d) Whenever men who have finished their day's work, or have been prevented from further work, shall come to the bottom to be hoisted out, an empty cage shall be given them for that purpose, unless there is an available exit by slope or by stairway in an escapement shaft, and providing there is no coal at the bottom ready to be hoisted.

SAFETY LAMPS.

§ 29. OPERATOR MUST FURNISH.] (a) At any mine where the inspector shall find the fire-damp is being generated so as to require the use of a safety lamp in any part thereof, the operator of such mine, upon receiving notice from the inspector that one or more such lamps are necessary to the safety of the men in such mine, shall at once procure and keep

for use such number of safety lamps as may be necessary.

MINE MANAGER MUST CARE FOR.] (b) All safety lamps used for examining mines or for working therein shall be the property of the operator, and shall remain in the custody of the mine manager, or other competent person, who shall clean, fill, trim, examine and deliver the same, locked and in a safe condition, to the men, upon their request, when entering the mine, and shall receive the same from the men at the end of their shift. But miners shall be responsible for the condition and proper use of safety lamps when in their possession.

STRETCHERS AND BLANKETS.

§ 30. At every mine where fifty men are employed underground it shall be the duty of the operator thereof to keep always on hand, and at some readily accessible place, a properly constructed stretcher, a woolen and waterproof blanket, and a roll of bandages in good condition and ready for immediate use for binding, covering and carrying any one who may be injured at the mine. When two hundred or more men are employed in any mine, two stretchers and two woolen and two waterproof blankets, with a corresponding supply of bandages, shall be provided and kept on hand. At mines where fire-damp is generated there shall also be provided and kept in store a suitable supply of linseed or olive oil, for use in case men are burned by an explosion.

CAUTION TO MINERS.

§ 31. AGAINST DOING UNLAWFUL ACTS.] It shall be unlawful for any miner, workman or other person knowingly or carelessly to injure any shaft, safety lamp, instrument, air-course or brattice, or to obstruct or throw open any air-way, or carry any open lamp or lighted pipe or fire in any form into any place worked by the light of safety lamps, or within five feet of any open powder, or to handle or disturb any part of the hoisting machinery, or open any door regulating an air-current and not close the same, or to enter any part of the mine against caution, or to use other than copper needles and copper-tipped tamping bars, or to disobey any order given in pursuance of this act, or to do any wilful act whereby the lives or health of persons working in mines or the security of the mine or machinery thereof is endangered.

§ 32. OPERATOR TO POST RULES—LEGAL NOTICE OF CONTENTS.] It shall be the duty of every operator to post, on the engine house and at the pit top of his mine, in such manner that the employes in the mine can read them, rules not inconsistent with this act, plainly printed in the English language, which shall govern all persons working in the mine. And the posting of such notice, as provided, shall charge all employes of such mine with legal notice of the contents thereof.

PENALTIES.

§ 33. FOR VIOLATING THIS ACT.] Any wilful neglect, refusal or failure to do the things required to be done by any section, clause or provision of this

act, on the part of the *person or persons herein required to do them,* or any violation of any of the provisions or requirements hereof, or any attempt to obstruct or interfere with any inspector in the discharge of the duties herein imposed upon him, or any refusal to comply with the instructions of an inspector given by authority of this act, shall be deemed a misdemeanor punishable by a fine not exceeding $500, or by imprisonment in the county jail for a period not exceeding six months, or both, at the discretion of the court: *Provided,* that in addition to the above penalties, in case of the failure of any operator to comply with the provisions of this act in relation to the sinking of escapement shafts and the ventilation of mines, the state's attorney for the county in which such failure occurs, or any other attorney, in case of his neglect to act promptly, shall proceed against such operator by injunction without bond, to restrain him from continuing to operate such mine until all legal requirements shall have been fully complied with.

Any inspector who shall discover that any section of this act, or part thereof, is being neglected or violated, shall order immediate compliance therewith, and in case of continued failure to comply, shall, through the state's attorney, or any other attorney, in case of his failure to act promptly, take the necessary legal steps to enforce compliance therewith through the penalties herein prescribed.

If it becomes necessary, through the refusal or failure of the state's attorney to act, for any other attorney to appear for the State in any suit involving the enforcement of any provision of this

act, reasonable fees for the services of such attorney shall be allowed by the board of supervisors, or county commissioners, in and for the county in which such proceedings are instituted.

For any injury to person or property, occasioned by any wilful violations of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby; and, in case of loss of life by reason of such wilful violation or wilful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives, not to exceed the sum of $5,000.

DEFINITIONS.

§ 34. MINE.] (a) In this act the words "mine" and "coal mine," used in their general sense, are intended to signify any and all parts of the property of a mining plant, on the surface or underground, which contribute, directly or indirectly, under one management, to the mining or handling of coal.

EXCAVATIONS OR WORKINGS.] (b) The words "excavations" and "workings" signify any and all parts of a mine excavated or being excavated, including shafts, tunnels, entries, rooms and working places, whether abandoned or in use.

SHAFT.] (c) The term "shaft" means any vertical opening through the strata which is or may be used for purposes of ventilation or escapement, or for the hoisting or lowering of men and material in connection with the mining of coal.

SLOPE OR DRIFT.] (d) The term "slope" or "drift" means any inclined or horizontal way, opening or tunnel to a seam of coal to be used for the same purposes as a shaft.

OPERATOR.] (e) The term "operator," as applied to the party in control of a mine in this act, signifies the person, firm or body corporate who is the immediate proprietor as owner or lessee of the plant, and, as such, responsible for the condition and management thereof.

INSPECTOR.] (f) The term "inpsector" in this act signifies the State Inspector of Mines, within and for the district to which he is appointed.

MINE MANAGER.] (g) The "mine manager" is the person who is charged with the general direction of the underground work, or both the underground and outside work of any coal mine, and who is commonly known and designated as the "mine boss," or "foreman" or "pitboss."

MINE EXAMINER.] (h) The "mine examiner" is the person charged with the examination of the condition of the mine before the miners are permitted to enter it, and who is commonly known, and has been designated in former enactments as the "fireboss."

APPROVED April 18, 1899; in force July 1, 1899.